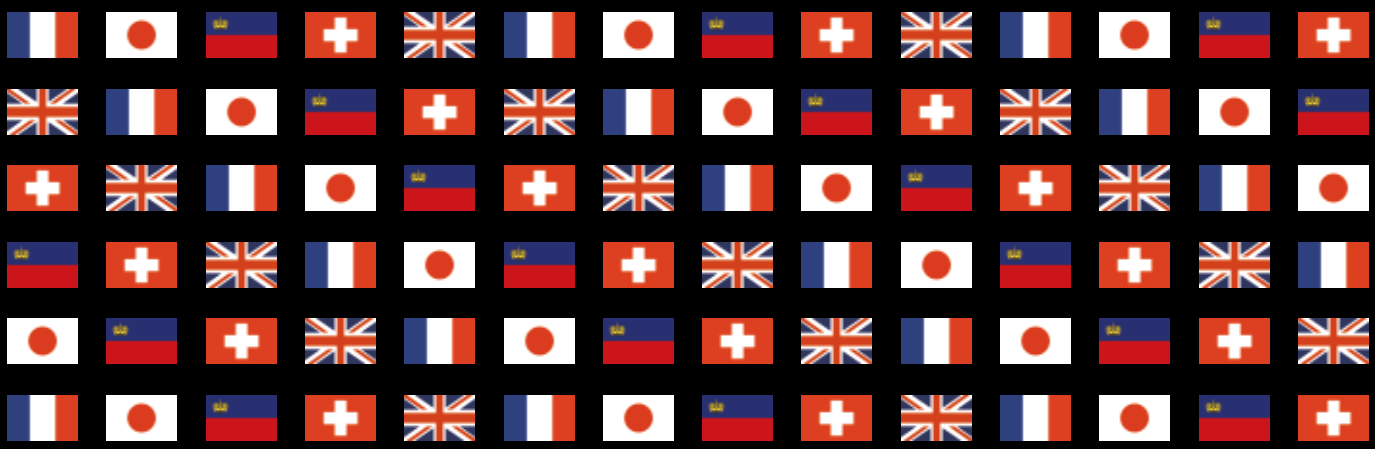
PRIVATE BANKING & WEALTH MANAGEMENT 2023

Contributing editors
Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov



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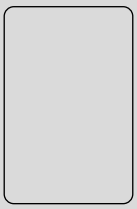

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Lenz & Staehelin

Lexology Getting the Deal Through is delighted to publish the seventh edition of *Private Banking & Wealth Management*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov of Lenz & Staehelin, for their continued assistance with this volume.

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Getting the Deal Through

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Introduction

Shelby R du Pasquier
Lenz & Staehelin

Private banking and wealth management have been and remain crucial pillars of the banking industry. Historically, a number of jurisdictions, such as the Channel Islands, Luxembourg, Switzerland and the United Kingdom, have developed a particular expertise in that field. That said, all financial centres today have a wealth management industry that typically target their own residents. Private banking and wealth management have further evolved in parallel with international economic growth and the ensuing creation of wealth. Over the past decade, Asia, in particular, has been a booming centre for private banking, with the emergence of major financial centres such as Hong Kong and Singapore. In 2020, Switzerland, as the world's leading wealth management centre, has maintained a market share of approximately 25 per cent of the cross-border wealth management business (equivalent to US$2.4 trillion under management in 2020). That said, it is worth mentioning that Hong Kong and Singapore have grown considerably in importance in recent years. Hong Kong has been catching up rapidly with a market share of approximately 22 per cent of global cross-border wealth (equivalent to US$2.1 trillion in 2020 showing an increase as compared to 2019), tailed by Singapore following a similar trajectory with a market share of 12.5 per cent (equivalent to US$1.2 trillion in 2020). As a result of the recent developments in Hong Kong, one would however expect the Asian growth in wealth management to mainly favour Singapore.

Wealth management is also one area that has been in a state of flux during the past couple of years, as a result of a maelstrom of legislative, regulatory and tax reporting changes. Those changes reflect both the aftermath of the 2008 global financial crisis and international trends in a number of areas, including 'know your customer' (KYC), anti-money laundering and tax transparency. As a result, private banking has been under increasing regulatory and compliance pressure. In the past, wealth management, depending upon the way it was conducted, could be performed in a number of jurisdictions with little or no supervision. The situation has now drastically changed, with the expansion of a dense regulatory grid covering the entire banking sector, including wealth management. As a result, private bankers are now generally subject to a framework of rules covering all aspects of their organisation and management, including minimum capitalisation and equity requirements, codes of conduct and 'fit and proper' tests applicable to both management and shareholders.

In parallel, the change of tack as regards taxation is particularly striking: after turning a blind eye for decades to the tax residence and status of their clients – when they were not instrumental in the structuring and administration of their undeclared financial assets – private bankers have been forced, particularly as a result of the implementation of the Financial Action Task Force recommendations with regard to the fight against money laundering, to become de facto the 'long arm' of their compliance officers and even regulators and tax authorities. As a matter of course, they now report suspicions of offences of a tax or other criminal nature that are potentially committed by their clients.

Information requests targeting financial advisers and their clients have become a routine occurrence for international financial centres. Under the unprecedented push from the Organisation for Economic Co-operation and Development (OECD), international tax treaties have been amended to facilitate the transmission of information to foreign tax authorities. This has resulted in a marked increase in the number of such requests and the speed of such transmission. Switzerland, which remains one of the world's largest wealth management jurisdictions, has thus seen a huge increase in the number of such requests, whereas there were just a few hundred 10 years ago, more than 100,000 information requests were sent to that country between 2015 and 2020.

In addition, since the introduction in 2014 of the Foreign Account Tax Compliance Act ((focusing on US taxpayers) and the implementation of the OECD's Common Reporting Standard, we have seen in recent years the implementation in more than 100 countries of a multilateral automatic exchange of information for tax purposes. As a result, an overwhelming flow of personal and financial information related to the clients of private bankers and asset managers has been going to the tax authorities of their clients' respective places of residence. As a result of these changes, the legal and regulatory environment within which private bankers operate has drastically changed over the past couple of years. Traditionally, banking secrecy and confidentiality were the key words that underpinned private banking and wealth management. Confidentiality remains an important consideration, except as regards tax matters, where it no longer exists. On the other hand, KYC and compliance have become increasingly critical aspects of wealth management, both at the inception of the relationship and on an ongoing basis. Compliance and tax transparency have thus become the key words of the international financial industry. Similarly, transparent client information and suitability assessments have become a key part of private bankers' jobs (eg, the Markets in Financial Instruments Directive (Directive 2004/39/EC)).

In parallel, there has been a gradual blurring of the boundaries between 'offshore' and 'onshore' private banking. Historically, a distinction was made, theoretically based upon the country of residence of the client base, whereby offshore banking targeted non-resident clients while the onshore industry was focused on residents. In practice, the development of offshore wealth management was closely linked to confidentiality and taxation issues. With the erosion of these attributes, the historical distinction between onshore and offshore banking is disappearing. This, in turn, has had an impact on the industry itself and has fostered an international concentration trend in recent years. This is leading to the emergence of large international financial groups, such as UBS, Credit Suisse, Santander and Julius Baer, that are developing an extensive network of affiliated entities or branches onshore, whereas other groups have exited private banking altogether or in certain juris- dictions. In contrast, smaller institutions having more limited resources focus on one or several target markets. The aggressive geographical development of

onshore banking in Asia is another sign of the tendency to operate in the markets where investors reside. This 'onshorisation' process is further accentuated by the increasingly aggressive enforcement by local regulators of cross-border rules, respectively new barriers to entry and cross-border offering of certain products and services.

Last, but not least, these changes have had an important impact on the relationship between the client and its bank. The often long-standing relationship between bankers and their clients has been eroded by the structural changes in the industry and its concentration, which has led to a large turnover of staff. The banker's role is now seen in military terms (ie, first line of defence) with an expanded role and responsibility towards local regulators and reporting duties deriving from the ever-increasing know-your-customer and anti-money laundering obligations that imply a systematic documentation of the client's transactions. The flurry of sanctions targeting Russian clients following the Ukrainian war has further accelerated and exacerbated this trend. As a result, the 'confidante' role historically played by private bankers with their clients is phasing out, a greater focus being put on the core tenets of wealth management, namely performance, quality of service and pricing, all of which are being put under pressure from the emergence of technology-driven products and services, spanning all aspects of the wealth management services, from robo-advisers to quantitative model trading strategies, aggregation and reporting across jurisdictions, institutions, currencies and asset classes.

The private banking and wealth management industry is certainly going through interesting times and is facing unprecedented challenges and paradigm shifts, all of which cross borders and span multiple jurisdictions.

France

Jérôme Barré
Barré & Associés

PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 What are the main sources of law and regulation relevant for private banking?

French banking legislation

The primary laws are set out in the Monetary and Financial Code promulgated in December 2000, which comprises a number of laws, in particular the Banking Act of 24 January 1984, which provides for the ordinary legal status of credit institutions and their supervision, and the Financial Act of 2 July 1996, which concerns not only investment firms, but also credit institutions in their activities constituting investment services.

In addition, the ordonance of 23 June 2016 implemented the EU Directive No. 2014/65 (MiFID II) while the ordinance of 1 December 2016 and the law of 9 December 2016 (Loi Sapin 2) reinforced anti-money laundering and anti-corruption rules.

Furthermore, Law No. 2019-486 of 22 May 2019 on the growth and transformation of businesses, known as Loi PACTE has modified several aspects of banking and financial law. These include the recognition of digital assets, whether in the form of cryptocurrency or 'tokens' and calls for funds operated in cryptocurrency allowing investors to obtain tokens (initial coin offering). Various new features are also planned, including developments in banking law affecting banking professionals, banking operations, savings and credit, internal transferability of life insurance policies within the same insurer without taxation.

- As of 1 January 2023, capital gains from the sale of cryptocurrencies, will be taxed: at the flat tax (30 per cent) for occasional traders; and at the non-commercial regime at a progressive income tax rate (zero per cent to 45 per cent) and social contribution (17.2 per cent) for the professional traders and the crypto miners.

French banking legislation supplemented by European Union Law

Most EU directives are directly applicable in France. EU law includes the CRD IV package, which became applicable in France in 2014 and which dictates the global standards for banks, the conditions governing the access and conduct of the business of banks, the rules on freedom of establishment and freedom to provide services, and the principles and technical instruments for prudential supervision and information and all prudential requirements.

In particular, we can find Directive No. 2013/36 on capital requirements, Regulation No. 575/2013 on prudential requirements for credit institutions and investment firms and Regulation No. 1024/2013 of 15 October 2013, which entrusted the European Central Bank (ECB) with the prudential supervision of credit institutions in the euro area member states.

The reform of the European Markets in Financial Instruments Directive (MiFID II) has been in force since 3 January 2018. Its objective is to strengthen the transparency of financial markets and the protection of investors.

EU Council Directive 2011/16 in relation to cross-border tax arrangements, nowadays known as DAC 6, has been in force since 25 June 2018. DAC 6 aims at transparency and fairness in taxation.

In line with the strengthening of the automatic exchange of tax information and the common reporting standard, the DAC 6 Directive (Directive on Administrative Cooperation) makes the reporting of cross-border tax arrangements set up by intermediaries on behalf of legal persons and individuals mandatory.

Examples of intermediaries are financial or tax advisers, accountants, banks (especially private banking and asset managers) and others who have been involved in a cross-border transaction, as attorney.

The DAC 6 was transposed into French law on 22 October 2019, Order 2019-1068 of 21 October 2019 on the automatic and mandatory exchange of information in the tax field in relation to reportable cross-border tax arrangements was published in the Official Journal.

On 25 November 2020, the French Tax Authorities published the final version of their guidelines on the scope and rules of application of France's DAC 6 rules and hallmarks. The French Tax Authorities' final comments do not make substantial changes to the drafts published for consultation in March and April 2020. However, they do provide some clarifications.

Regulatory bodies

2 What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The power to regulate the banking and financial sector is now shared between the European legislature, the Financial Markets Authority (AMF) and the Minister of Economy and Finance, assisted by a consultative authority, the Advisory Committee on Financial Legislation and Regulation.

Prudential and Resolution Control Authority

Until the law of 20 January 2017, the prudential control and resolution authority was qualified as an independent administrative authority. It now appears as an ad hoc entity without any legal personality, operated under the supervision of the French Central Bank.

The Prudential and Resolution Control Authority (ACPR) has a supervisory and control mission that has two objectives: the preservation of the stability of the financial system and the protection of clients, policyholders, participants and beneficiaries of persons under its control. Thus, it is responsible for supervising and controlling the financial system and granting and withdrawing licences for banking activities.

Financial Markets Authority

The AMF, an independent public authority with legal personality, 'comprises a college, a sanctions commission and, where appropriate,

specialised commissions and advisory commissions'. It is responsible for ensuring the protection of savings, investor information and the proper functioning of financial instruments markets, and is vested with several powers with regard to markets, professionals intervening in them and, more generally, all participants, issuers and investors. It has regulatory power, supervisory power concerning the regularity of transactions and compliance with professional obligations, power of injunction, direct and indirect power of sanction, both administrative and disciplinary, and power of administrative composition, which is a power of transaction. The AMF thus has complete power: it is a legislator, a judge and a police officer.

Minister of Economy and Finance

The minister has exclusive jurisdiction in respect of general conditions governing the relationships of credit institutions with customers, instruments and credit rules.

European Central Bank

The European Central Bank (ECB) supervises all banks in the euro area, in the framework of the single supervisory mechanism. It is responsible for ensuring appropriate monitoring of all those banks' performance under supervisory tasks. The ECB has a responsibility in particular for direct supervision of banks:

- having assets of more than €30 billion or constituting at least 20 per cent of their home country's GDP; and
- that have requested or received direct public financial assistance from the European Financial Stability Facility or the European Stability Mechanism.

Private wealth services

3 | How are private wealth services commonly provided in your jurisdiction?

Private wealth services are provided by banks and asset management companies, but they are also provided by family offices (organisations specialising in the administrative and financial management of important assets), and the Conseillers en Gestion de Patrimoine, which are independent wealth management advisers.

New players have emerged in France since 2015: the fintechs in wealth management. Digitalisation and robo-advisoring make wealth management more accessible, with lower management costs and higher performance. To minimise costs for clients, these new private banks prefer to outsource certain services and call on external partners (lawyers, notaries, credit brokers) for a client's specific question rather than integrating these expensive services within their structure.

Definition of private banking

4 | What is the definition of private banking or similar business in your jurisdiction?

There is no legal definition of a private bank: it is a specialised financial institution which may be an independent bank or a bank tied to a banking network. All the major banks have their own private banking centres, either set up by themselves or acquired as an existing family establishment.

A private bank will offer financial and portfolio management services, sometimes including real estate investments, in addition to personalised services tailored to the client's situation or wishes.

Licensing requirements

5 | What are the main licensing requirements for a private bank?

Private banking activities are not specifically regulated. These activities, which combine the performance of credit activities and the performance of investment activities, require an investment services licence and a banking licence. The French legal framework does not set out specific licensing requirements for the provision of private banking and wealth management services. The relevant licensing requirements are those imposed on banks when they apply for their authorisation.

Applications for bank licences must be presented to the ACPR under the conditions below:

- suitability of the legal form for the proposed activity;
- minimum paid-up capital;
- programme of operations, technical and financial resources and organisation;
- identity and status of capital contributors, and where applicable, of their guarantors, and the size of their holding;
- central administration located in the same national territory as the registered office;
- the activity must be effectively run by at least two people, whose knowledge, experience and fitness must be demonstrated, both individually and collectively, as must their availability; these persons should also meet the propriety requirements for their position;
- members of the governing body must meet knowledge, experience, fitness and propriety requirements, assessed both individually and collectively, and also satisfy the availability and propriety requirements for their position;
- managers of key functions must meet propriety, knowledge, experience and fitness requirements; and
- assets must exceed liabilities by an amount that is at least equal to the minimum capital requirement.

While the ACPR is involved in the authorisation decision and its preparation, the decision on authorisation now rests with the ECB. The ACPR still remains competent:

- for decisions to refuse authorisation; and
- for licensing branches of banks in third countries.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

The ACPR must be informed if there are changes to the credit institutions that may affect one of the conditions above necessary for licence authorisation.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

While a credit institution cannot be constituted as a personal business, no particular legal form is required by the French Code. However, this freedom to choose the form is not absolute: not only must specific legal statutes be taken into account, but also the form chosen must be adapted to the activity of banks.

In practice, the most common form or organisation for a private bank is a French Société Anonyme (limited company).

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

All applications for accreditation must be submitted to the Prudential and Resolution Control Authority (ACPR). The Commission examines whether the application meets all the requirements of French law. If this is the case, it shall, within the period prescribed by French law, adopt a draft

decision proposing to the European Central Bank (ECB) that authorisation be granted. The draft shall be notified to the ECB and to the applicant. If the application does not meet the requirements, it shall reject the application for authorisation. The ECB must act within the time limit set by national law: six months in principle, the maximum period being 12 months.

All applications for accreditation must be submitted to the ACPR. The Commission examines whether the application meets all the requirements of French law. The Commission has six months to decide from the reception of a complete file. As from the receipt of a properly constituted application for approval, failure to reply by the end of the six-month period shall constitute an implicit decision to reject. If this is the case, it shall, within the period prescribed by French law, adopt a draft decision proposing to the ECB that authorisation be granted. The draft shall be notified to the ECB and to the applicant. If the application does not meet the requirements, it shall reject the application for authorisation. The ECB must act within the time limit set by national law: six months in principle, the maximum period being 12 months.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

Both the ECB and the ACPR have the right to initiate the withdrawal of a banking licence in certain circumstances. A licence will be withdrawn:

- at the request of credit institutions; or
- automatically:
  - if the establishment no longer meets the conditions or commitments to which its approval was subject;
  - if the establishment has not made use of its approval within 12 months; or
  - if the establishment has not operated for at least six months.

Decisions refusing approval may be appealed in the following circumstances:

- if the ECB has decided to reject the application, the appeal must be lodged with the European courts; or
- if the refusal has been decided by the ACPR, an action for annulment must be brought before the Council of State.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

The following financial activities are subject to licensing:

- order reception and transmission for third parties;
- order execution for third parties;
- proprietary trading;
- portfolio management for third parties;
- investment advice;
- underwriting;
- guaranteed placement;
- non-guaranteed placement; and
- operation of a multilateral trading facility.

Requirements

11 | What are the main licensing requirements for wealth management?

To obtain a licence authorising certain financial activities, a licence application for investment services must be sent to the ACPR and shall fulfil the following conditions:

- registered office located and business effectively run in France;
- sufficient initial capital and appropriate financial resources for the proposed activities;
- identity and status of direct and indirect shareholders, and the size of their holding;
- the activity must be effectively run by at least two people, whose knowledge, experience and fitness must be demonstrated, both individually and collectively, as must their availability; these persons should also meet the propriety requirements for their position;
- members of the governing body must meet propriety, knowledge, experience and fitness requirements, both individually and collectively, and also satisfy availability requirements;
- managers of key functions must meet propriety, knowledge, experience and fitness requirements;
- suitability of the legal form for the proposed activity; and
- a programme of operations for each of the proposed services, and, where applicable, a programme of operations for the portfolio management or investment advice activity approved by the AMF.

12 | What are the main ongoing conditions of a wealth management licence?

The requirements for granting the licence must be maintained on an ongoing basis.

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 | What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

Some obligations are applicable to entities regulated by the Financial Markets Authority (AMF).

Obligation of vigilance

This implies maintaining updated identification of clients, including occasional clients and effective beneficiaries of 'legal personality' clients. The level of vigilance depends on the level of risk incurred. This obligation requires professionals to perform their own classification of the risks and to implement a formalised control system for their activity developed in accordance with the AMF guidelines specifying certain provisions on the prevention of money laundering and the fight against the financing of terrorism.

Obligation to report any suspicions to TRACFIN

TRACFIN handles the processing of information and action against illegal financial circuits and is the French anti-money laundering unit. The obligation to report any suspicions is based on a money laundering risk analysis and applies to any suspicion of tax fraud or breaches of ordinary law punishable by a prison sentence of more than one year. In 2017, 71,000 reports were received by the department in charge of the fight against money laundering and terrorist financing.

Politically exposed persons

14 | What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

The 4th Money Laundering Directive and the provisions in paragraphs 2 and 3 of article L. 561-10 define PEPs as follows:

> *The client, where applicable his beneficial owner, the beneficiary of a life insurance or capitalisation contract, where applicable his beneficial owner, is a person who is exposed to specific risks*

because of the political, judicial or administrative functions he or she exercises or has exercised on behalf of another country or those exercised currently or in the past by direct family members or persons known be closely associated with him or her in the course of a business relationship.

The product or operation presents, by its nature, a particular risk of money laundering or terrorist financing, in particular when they promote anonymity.

The nature of the additional vigilance to be implemented with respect to business relationships with PEPs is specified within the organisation's internal procedures. The measures implemented are based on objective elements according to the risk profile of each of the business relationships with PEPs.

Documentation requirements

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

The bank has obligations in terms of customer knowledge, particularly in the context of the fight against money laundering and terrorist financing. These obligations begin before entering into a business relationship with the client. As such, before opening an account a number of verifications must be carried out:

- ensuring the identity of the applicant:
  - for an individual, by the production of a valid official document carrying his or her photograph (national identity card or passport generally); and
  - for a legal person, by the production of any act or official register extract dating from less than three months prior (KBis);
- checking the applicant's home address using a recent proof of address, such as a rental contract, telephone or electricity bill, rent receipt or insurance certificate;
- asking about the purpose and nature of the business relationship and any other relevant information about this customer; and
- requesting a specimen of the applicant's signature.

Tax offence

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Regarding the general offence of money laundering, any misdemeanour or felony can constitute a predicate offence, including a tax or an embargo offence, if the perpetrator of the predicate offence results in a profit or receives an asset from that offence. The offence of money laundering is independent of the predicate offence. Therefore, French courts could consider that, under certain circumstances, a predicate offence exists even if:

- it falls outside the territorial scope of French criminal law, as it was committed entirely abroad;
- the perpetrator of the predicate offence was not charged or even prosecuted;
- the statute of limitations applicable to the predicate offence has expired;
- the perpetrator of the predicate offence is immune to prosecution; or
- the circumstances of the predicate offence are not fully established.

Compliance verification

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

The collection of proof of residence may be useful in the context of the implementation of obligations relating to the fight against tax fraud and evasion. Pursuant to article 1649 AC of the General Tax Code, financial institutions shall identify the tax residence of the customer and, where applicable, the beneficial owner.

In addition, financial institutions also take into account the risks related to:

- the countries or territories of origin or destination of funds, particularly with regard to the lists published by the FATF, the blacklist published by the European Commission the list of uncooperative countries for tax purposes countries defined in article 238-0 A of the General Tax Code26 , lists of countries 'under sanctions' (restrictive measures, economic sanctions and the list of countries 'under restrictive measures, economic sanctions, embargoes and press releases from the Minister in charge of the economy or the in charge of the economy or TRACFIN; and
- the products, services and/or distribution channels used, taking into account the typological cases by TRACFIN or any other competent national or international body or authority in LCB-FT matters.

Moreover, in the context of the circular on 'processing of amending declarations of taxpayers holding foreign assets' of 21 June 2013 issued by the Minister Delegate in charge of the Budget, the taxpayer is obliged to submit a tax return to the tax authorities by 31 December 2017 at the latest. Since 1 January 2018, taxpayers have been following the ordinary law procedure to disclosure their assets held abroad by applying to the personal income tax department on which they are subject. The financial institutions will carry out an enhanced examination of any repatriation of funds from abroad with tax regularisation from abroad with tax regularisation.

Since 1 January 2018, financial institutions continue to carry out enhanced scrutiny on disclosure of assets held abroad and ensure:

- either, that the repatriated foreign assets were properly declared to the tax authorities (in particular, collection of a tax certificate issued by the tax authorities)
- either that the repatriated foreign assets were declared to the tax authorities (in particular, collection of a tax certificate issued by the authorities);
- or, that the repatriated assets are part of a tax regularisation request (in particular, collection of the request filed by the tax authorities).

Then, on 13 March 2018, EU economic and financial affairs ministers adopted the European Commission's June 2017 proposal on new transparency rules for intermediaries designing or selling potentially harmful tax regimes.

Article 1740 A-bis of the General Tax Code provides that where the tax authorities impose an increase of 80 per cent on the taxpayer (in the event of abuse of rights or fraudulent practices), any natural or legal person who, in the exercise of a professional advisory activity of a legal nature, financial or accounting or holding property or funds on behalf of a third party, intentionally provided that taxpayer with a benefit directly enabling the commission of the sanctioned conduct, is liable to a fine of €10,000, which may be increased to 50 per cent of the income derived from the benefit provided to the taxpayer.

Liability

18 | What is the liability for failing to comply with money laundering or financial crime rules?

Disregard of professional obligations is punished by the Prudential and Resolution Control Authority, usually by a reprimand, a financial penalty and public notification, the extent of the penalty depending on the number of grievances and breaches against the credit institution. However, disciplinary liability is not the only one that can be applied: so can civil and criminal liability.

The requirements for granting the licence must be maintained on an ongoing basis.

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 | Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

There are three types of client:

- non-professional client: any client who does not fall into either of the other two categories, or who optionally applies to be recognised as a non-professional client;
- professional client: a client with the experience, knowledge and expertise to make his or her own investment decisions and properly assess the risks involved. They are classified by both nature and size; and
- eligible counterparties: professional legal persons authorised or regulated to operate on the financial markets.

There are three types of opt-out options:

- from eligible counterparties to professional client:
  - at the initiative of the institution or at the request of the counterparty;
  - on a case-by-case basis or by general agreement; or
  - the institution is not under any obligation to accept; and
- from professional client to non-professional client:
  - at the initiative of the institution or at the request of the client;
  - requires a written document;
  - either in general or for certain services, types of transactions or products only; or
  - the institution is not under any obligation to accept.

An opt-in option is also possible from non-professional to professional client on several conditions:

- an adequate assessment of knowledge and experience; and
- a verification of a certain number of criteria such as the transactions carried out, the value of the portfolio, etc.

The exercise of the option is subject to the respect of a restricted procedure: written notification of the client, information, etc.

Client categorisation

20 | What are the consequences of client categorisation?

The purpose of client categorisation is to establish different levels of client protection based on their knowledge of financial instruments and services and their ability to bear the risks involved. The highest level of protection is granted to non-professional clients. In particular, they should benefit from services whose adequacy and appropriateness must first be assessed on the basis of their profile and more complete information. Accordingly, the lowest level of protection is reserved for eligible counterparties, who, for example, are the only ones that do not benefit from the best protection obligation. This categorisation applies to all clients, regardless of nationality.

The purpose of client categorisation is to establish different levels of client protection based on their knowledge of financial instruments and services and their ability to bear the risks involved. The highest level of protection is granted to non-professional clients. In particular, they should benefit from services whose adequacy and appropriateness must first be assessed on the basis of their profile and more complete information. Accordingly, the lowest level of protection is reserved for eligible counterparties, who, for example, are the only ones that do not benefit from the best protection obligation. This categorisation applies to all clients, regardless of nationality. With the entry into force of Markets in Financial Instruments Directive (MiFID) II, service providers will have to comply with new obligations, in particular a greater obligation of transparency on the costs for which information must be provided annually and must cover all costs and expenses associated with financial instruments, in absolute value and percentage.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

MiFID II considerably strengthens investor protection, both in terms of conflicts of interest and conduct of business rules.

It is the purpose of customer protection rules and the duty of each professional to reduce this asymmetry of information so that each customer can be offered products adapted to his or her needs and expectations for him or her to make his or her purchase or subscription decision in an informed manner. This is crucial for public confidence in the financial sector.

The role of the Prudential and Resolution Control Authority is to promote fair business conduct and practices among professionals, taking into account the interests of clients, limiting risks to clients and preventing conflicts of interest to the detriment of clients.

Some principles can be identified in terms of good business conduct and customer protection:

- to ensure that the client is properly informed and that explanations are given fairly, including on costs and risks;
- ensuring that the client's interests are taken into account in all circumstances and that excessive risks are not transferred to the client; and
- beyond the necessary compliance with regulations, these principles of clarity and loyalty towards customers must govern the conduct of companies and their staff.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

The freedom of transfer of funds presupposes not only that they are not subject to prior authorisation, but also that the operations at their origin are not either. Otherwise, this authorisation indirectly limits the said transfers. With certain exceptions, transfers of funds – known as investments – are not subject to prior authorisation and are themselves free: individuals and companies are free to open foreign accounts and foreign currency accounts in France; and credit institutions may grant loans to non-residents. However, this is a freedom supervised by the public authorities: the transfer of funds generates an obligation of information, at the expense of both banking institutions and non-banking agents.

These obligations are imposed for monetary, fiscal or anti-money laundering reasons without being considered as obstacles to the freedom of cross-border transfers.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

Credit institutions are covered by article R. 152-1, I of the Monetary and Financial Code. According to this article, these institutions are required to draw up monthly statistical returns relating to payments between residents and non-residents, made in France and exceeding €12,500, on the basis of information communicated to them by the residents who are the authors or beneficiaries of these payments.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

French law does not prescribe any other restrictions. On the contrary, there is a real political will to provide a regulatory framework for cryptocurrencies, first by establishing a real tax regime and then by setting up an authorisation for digital service providers with the AMF, as well as the possibility of investing in these securities through a life insurance contract

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

For a long time, no text expressly provided banking secrecy. If it was recognised that the banker was bound by a civilly sanctioned duty of discretion, there was discussion as to whether this secrecy should be sanctioned criminally. The Banking Act of 24 January 1984 removed all uncertainty by referring to the Criminal Code. It is therefore clear that bankers must refrain from disclosing information about their clients, under penalty of civil and criminal sanctions.

Based on respect for private life, confidentiality obligations are simply about protecting the customer – more generally the persons concerned by confidential information – so that they can waive secrecy and thus authorise the banker to communicate the said information. In the absence of such authorisation, banking secrecy precludes any communication; it is said to be enforceable against third parties.

Persons liable for the obligation to secrecy are defined in article L. 511-33, I, of the Monetary and Financial Code. These are all those who, in any capacity, participate in the management or direction of a credit institution or who are employed by it. In addition to this first circle of debtors, a second circle includes persons who, in the course of their duties, may obtain access to confidential information held by credit institutions. Thus, for example, all persons participating in the supervisory tasks entrusted to the Prudential and Resolution Control Authority (ACPR) are bound by professional secrecy.

Scope

26 | What information and documents are within the scope of confidentiality?

Banking secrecy covers only confidential information. The banker is therefore prohibited from disclosing to third parties the amount of an account balance or the amount of credit granted to a customer. However, general information that may be given by a banker to a third party who inquires about the creditworthiness of one of his or her clients is not confidential. This information is of such a nature if the banker merely indicates that due dates are difficult or that payments are regular.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

Exceptions to banking secrecy are tending to increase. The causes of this are various: among them are the control of the administrative authorities over credit institutions, the controls exercised over customers, internal cooperation between the various financial authorities and European cooperation. Because of the basis of banking secrecy, namely the protection of customers, these derogations are strictly interpreted. Thus, there a limited series of exemptions:

- direct exemptions: according to article L. 511-33, paragraph 2, I, of the Monetary and Financial Code, 'in addition to cases where the law so provides, professional secrecy may not be invoked against the ACPR, the Banque de France, the judicial authority acting in criminal proceedings or committees of inquiry'; and
- indirect exemptions: where persons to whom banking secrecy cannot be invoked are authorised to communicate information of which they have knowledge. In principle, these persons are themselves bound by professional secrecy. However, the Monetary and Financial Code provides for cases where communication may take place.

Breach

28 | What is the liability for breach of confidentiality?

According to article L. 511-33 of the Monetary and Financial Code, any person who does not comply with this obligation can face tortious or criminal liability. The disclosure of information subject to banking confidentiality is punishable by up to five years' imprisonment and a €300,000 fine (article 226-16 French Penal code).

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

A service provider authorised in France that intends to do business in another EU country must notify the French regulatory authority before starting its activities. Depending on the intent to create an establishment or to exercise the freedom to provide services across the EU, a specific notification form should be sent to the regulatory authority. Once it has given its decision, services authorised in France can be provided across the EU. Moreover, the French service provider must appoint a senior manager for the new European branch. Before the appointment can be effective, the French authority must be notified in order to give its approval.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Banking or financial institutions with a registered office in France can benefit from the European passport if the following conditions are met:

- the institution is a subsidiary of one or more Etablissements de Crédit (ECs) approved in France and holding at least 90 per cent of the voting rights attached to its shares;
- the parent undertaking or undertakings shall justify the prudent management of the financial institution and declare, with the

agreement of the Prudential and Resolution Control Authority (ACPR), that they are jointly and severally liable for the commitments entered into by the financial institution; and
- the financial institution effectively provides banking services of the same kind on the territory of the French Republic and is included, in particular for those activities, in the supervision on a consolidated basis to which its parent undertaking or each of its parent undertakings is subject.

Regulation

31 | What forms of cross-border services are regulated and how?

A service provider authorised in France that intends to do business in another EU country must notify the French regulatory authority before starting its activities. Depending on whether the intent is to create an establishment or to exercise the freedom to provide services across the EU, a specific notification form should be sent to the regulatory authority. Once it has given its decision, services authorised in France can be provided across the EU. Moreover, the French service provider must appoint a senior manager for the new European branch. Before the appointment can be effective, the French authority must be notified to give its approval.

Banking or financial institutions with a registered office in France can benefit from the European passport if the following conditions are met:
- the institution is a subsidiary of one or more ECs approved in France and holding at least 90 per cent of the voting rights attached to its shares;
- the parent undertaking or undertakings shall justify the prudent management of the financial institution and declare, with the agreement of the ACPR, that they are jointly and severally liable for the commitments entered into by the financial institution; and
- the financial institution effectively provides banking services of the same kind on the territory of the French Republic and is included, in particular for those activities, in the supervision on a consolidated basis to which its parent undertaking or each of its parent undertakings is subject.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

The European passport enables banking institutions, having obtained authorisation from the authority of their country of origin, to operate throughout the EU or in a state party to the Agreement on the European Economic Area (EEA). If a banking institution in another member state wishes to provide its services in France, the term 'passport in' is used; if a French management company wishes to provide its services in the EU or in another state party to the EEA Agreement, the term 'passport out' is used.

The AMF ensures that branches established in France under cover of the European passport comply with the laws and regulations applicable to them. A regularly updated list of foreign management companies holding the European passport in France and the associated valid services and activities is available on the GECO database.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Sending documents relating to banking or regulated financial activities in France and their acceptance by clients or prospective clients may be considered as conclusion of underlying operations and could fall under the banking or financial activities licensing requirements.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 | What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

France has imposed a requirement to disclose any foreign bank accounts, any foreign life insurance policies and any foreign digital asset accounts (including cryptoassets) opened, held, used or closed abroad.

Reporting requirements

35 | Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Institutions that pay interest, dividends, income or other income from transferable securities (the 'paying institutions') are required to submit an annual summary declaration, known as the Imprimé Fiscal Unique (IFU), to the French tax authorities no later than 15 February following the year in which they made these payments.

In banking institutions, failure to comply with this obligation may lead to:
- commercial difficulties, with payment recipients needing these elements to prepare and verify (pre-filled returns) their own tax returns; and
- tax penalties, the amounts of which may prove significant in the event of repeated infringements (a fine equal to 50 per cent of the sums not declared).

Sending accurate and complete IFUs is therefore a major annual challenge for banks. Thus, the IFU can no longer be considered a simple formal obligation to limit the risks of non-reporting of income by customers. In just a few years, this declaration has become a strategic subject, in terms of both taxation and commercial and marketing responsibility.

Client consent on reporting

36 | Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

No consent is required.

STRUCTURES

Asset-holding structures

37 | What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

Insurance policies

Life insurance may be the preferred investment for French people. First, life insurance is a savings product whose gains on withdrawal or surrender are taxed less the longer the contract is held (for gains from premiums paid before 27 September 2017). It is important to know this so as to optimise the management of these policies. Life insurance

benefits from a specific civil regime in terms of transmission: the sums paid to the beneficiaries of the contract at the time of the insured's death are paid out outside the estate, These sums are transferred without tax to the beneficiary, up to €152,500 per person, if they come from premiums paid by the subscriber before the age of 70.

Consequently, life insurance is the ideal investment to meet three objectives: to enhance the value of capital; to receive additional low tax income, immediately or in retirement; and to optimise the transfer of assets.

Civil companies

A *société civile* (SC) is an entity with civil activity that does not correspond to a business entity for which the law assigns a commercial nature as a result of its form (ie, type of entity) or purpose.

They are subject to the tax treatment of partnerships, which is characterised by the taxation of profits, not in the name of the legal entity, but in the personal name of each of the partners for the fraction corresponding to his or her rights.

A *société civile immobilière* (SCI) can be an ideal tool to make many real estate investments that could not have been made by one person alone. It makes it possible to raise capital to increase the financial capacity of the partners and to facilitate the obtaining of external financing (in particular, bank loans), with a view to purchasing a property complex or a rental property portfolio (furnished rental SCI). An SCI also makes it possible to pool (share) the expenses and costs related to the holding of real estate. The civil real estate company of attribution makes it possible to prepare the division between the partners of a real estate property.

Know-your-customer

38 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

To establish a banking relationship with a structure, the following information is required:

- name of the structure;
- legal form;
- names of the members of the representative body;
- registration numbers;
- activity of the company;
- address, phone number and email address; and
- an extract from the register.

Controlling person

39 What is the definition of controlling person in your jurisdiction?

A 'controlling person' or 'beneficial owner' is defined as the individual who directly or indirectly owns or controls the company. Under no circumstances may it be a legal person. The beneficial owner is:

- an individual holding, directly or indirectly, more than 25 per cent of the capital or voting rights of the company;
- an individual who exercises, by other means, a power of control over the management, administrative or management bodies of the company or over the general meeting of its members or shareholders; or
- only in the absence of identification of an ultimate beneficiary, according to the two preceding criteria, the individual who directly or indirectly occupies (through one or more legal persons) the position of legal representative of the company.

Obstacles

40 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

No.

CONTRACT PROVISIONS

Types of contract

41 Describe the various types of private banking and wealth management contracts and their main features.

There are several types of private banking contract: there are typically investment advisory agreements, bank account agreements and asset management agreements. These contracts are usually accompanied by a general private banking framework describing the features of the new relationship between the individual and the private bank.

Liability standard

42 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

The sanctions incurred by credit institutions are various: they may be professional, criminal or civil. The most general sanction remains the civil liability of credit institutions, which obeys the rules of ordinary law: it is tortious towards third parties and contractual in the relations of credit institutions with their customers.

Credit institutions generally incur liability in tort for their personal acts and for the acts of their employees, whereas the extent of the contractual liability depends on the obligations stipulated by the contracts binding them to their customers. However, this responsibility is sometimes difficult to retain because many contracts are only verbal, which makes it difficult to prove the content of the obligations. Even if this proof is provided, compensation may only be partial, or even excluded, if clauses lightening liability have been stipulated, which is common in banking matters.

Mandatory legal provisions

43 Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

There are no specific mandatory provisions or requirements imposed by law or regulation with respect to private banking. Nevertheless, according to the MiFID II Regulations, a written framework agreement between the financial institution and its private client is required.

This cannot be satisfied by a simple discussion between the private banker and his or her client, however thorough and regular it may be. The client must systematically and periodically answer long and precise questionnaires.

MiFID II also requires banks always to have their customers sign a contract. Until now, some forms of advice were given without a contract.

To guarantee maximum transparency, banks will have to send information very regularly to their customers about the validity of what is offered to them, the characteristics of the products purchased and on the fees they are charged.

Limitation period

44 What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The applicable limitation period for claims under a private banking contract is the ordinary five-year limitation period. Since this limitation is provided by law, it is not possible for parties to waive or alter it.

DISPUTES

Competent authorities

45 What are the local competent authorities for dispute resolution in the private banking industry?

French private courts such as Tribunal de Grande Instance, Court of Appeals and the Court de Cassation are competent to rule on disputes relating to banking and financial services.

Disclosure

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

There is no general obligation to disclose the outcome of private banking disputes to such authorities.

The Prudential and Resolution Control Authority (ACPR) has no jurisdiction to settle any dispute. However, the ACPR can provide the client with general information on the regulations and to whom the client can address his or her complaint.

In addition, sending a copy of the complaint that the client sent to the professional to the ACPR is useful to be informed of areas of dissatisfaction and to detect the worst practices.

UPDATE AND TRENDS

Recent developments

47 Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

The banking sector is more particularly private banking is in the grip of major changes in recent years. Indeed, it must face many factors of complexity that weigh on their profitability and the level of customer service: increased regulatory weight, lower returns on financial assets, high fees, the emergence of new customer needs, and recently, the management and transparency of tariffs. In addition, it must face the rise of fintech. Several banks have included these in their service offerings.

Today, France is the leading major European country in the use of the Internet for banking services (source: Banque de France). This leads many foreign companies to set up in France. Finance accounts for more than 4 per cent of French GDP. It is the third-largest sector in Île-de-France in terms of employment. France has nearly 750 fintech companies (Business France).

At the regulatory level, fintechs benefit in France from more flexible regulations than banks. But some sectors are regulated, in particular by the implementation of the RGPD regulation and crowdfunding. The Financial Markets Authority, in partnership with the ACPR, has created the fintech, innovation and competitiveness cluster to help develop a financial centre of excellence in terms of both the level of security and the ability to adapt regulations. In January 2019, the Finance Innovation and collective global competitiveness cluster of five French fintechs created 'WealthCockpit' to rethink the world of private banking. Thus, France has opted for the system of 'tailored regulation' as in the Netherlands and not for the German system of 'same risks, same regulation' or the English system of 'sandbox'.

Japan

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PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 What are the main sources of law and regulation relevant for private banking?

Although there is no legal definition for 'private banking' in Japan, it is considered comprehensive asset management and administration to meet the financial needs of high net worth individuals and recognised as a broad concept including the following:

- asset management services using discretionary accounts;
- investment and insurance advice;
- creation and sale of investment trusts;
- trust services (testamentary trusts and executions);
- normal banking services;
- securities trading;
- buying and selling currency and funds; and
- custody services.

These operations are primarily regulated by (1) the Financial Instruments and Exchange Act (FIEA) and related laws and regulations, which aim to ensure the fairness of transactions in financial instruments and the protection of investors, (2) the Banking Act and related laws and regulations, which provide for the licensing of banks and the regulation of bank conduct and (3) the Trust Business Act and related laws and regulations, which regulate trust related businesses. In addition, these regulations are under the jurisdiction of the Financial Services Agency (FSA), which publishes not only laws and regulations but also supervisory guidelines and guidelines as soft law, which businesses are also required to comply with. The Comprehensive Supervisory Guidelines for Major Banks, etc (guidelines for the banking industry) make some reference to private banking and wealth management and provide some points to bear in mind when engaging in such complex financial services.

Regulatory bodies

2 What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The FSA is the main regulator of financial administration and has jurisdiction over many of the various activities that fall under the private banking and wealth management categories. Furthermore, the Local Finance Bureau, one of the local branches of the Ministry of Finance, carries out local FSA operations under the mandate of the FSA Commissioner. The Japan Securities Dealers Association (JSDA) formed by the securities companies and registered financial institutions in Japan and the Japanese Bankers Association (JBA) formed by banks, bank-holding companies, and bankers' associations in Japan are the main self-regulatory organisations in Japan for the area related to private banking and wealth management.

Private wealth services

3 How are private wealth services commonly provided in your jurisdiction?

While the individual businesses that make up wealth management are carried out by securities companies (Type 1 financial instruments business operators), megabanks, ordinary regional banks, and trust banks, the provision of one-stop wealth management services for high net worth individuals is dominated by comprehensive financial groups (including domestic offices of foreign financial groups), which include banks, trust companies, and securities companies as group companies.

Definition of private banking

4 What is the definition of private banking or similar business in your jurisdiction?

There is no definition of 'private banking' or wealth management services for high net worth individuals. However, private banking is considered comprehensive asset management and administration to meet the financial needs of high net worth individuals.

Licensing requirements

5 What are the main licensing requirements for a private bank?

Although there is no legal definition for 'private bank', this depends on which entity (specifically, a securities company, bank, trust bank, etc) performs services constituting private banking.

If an entity intends to engage in Type 1 financial instruments business or discretionary investment management business, it needs to be registered by the Prime Minister but, if the following requirements are not met, such a registration will be refused: it must comprise, among others:

- sufficient human resources and business execution systems;
- it must be a joint stock company or similar type of entity;
- having in-country business offices;
- keeping a certain level of assets (ie, the minimum amount of state capital or amount of net asset);
- its major shareholders are not certain disqualified individuals or companies; and
- not concurrently engaging in a prohibited business.

To engage in banking business, a banking business licence must be obtained, the examination for which will determine whether the following criteria are met: (1) the applicant has a sufficient financial basis to carry out a banking business soundly and efficiently, and the applicant's prospects for balancing-related earnings and expenses are good, and (2) the applicant has the knowledge and experience to carry out this business accurately, fairly, and efficiently in light of its personnel composition and other factors, and has sufficient social credibility.

Most trust business is carried out by licensed banks referred to as trust banks. In order for financial institutions to engage in trust business, they must obtain approval from the Prime Minister based on the Act on Engagement in Trust Business by Financial Institutions, the examination for which is based on whether the financial institution in question meets the following criteria: (1) it must have a sufficient financial basis for carrying out the trust business soundly and be able to carry out the trust business properly, and (2) its performance of this business must be unlikely to disturb the financial order.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

As the registration, licence, or authorisation is subject to revocation if any of the relevant requirements are no longer met, these must continue to be met. The Comprehensive Supervisory Guidelines for Major Banks, etc. (guidelines for the banking industry) focus on and clarify the supervision of the following aspects of private banking and wealth management business: (1) setting sound and appropriate profit and business targets and supervising and controlling business operations, (2) establishing a framework for supervising and controlling appropriate business operations, (3) establishing an information management framework, etc, (4) establishing a system for eliminating violations of laws and regulations and ensuring fair and appropriate transactions, etc, and (5) establishing systems to detect and eliminate money laundering and suspicious transactions, etc.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

In order to carry out the main businesses constituting private banking business (eg, Type 1 financial instruments business, discretionary investment management business, and banking business), it is necessary to take the form of a joint stock company. Securities companies registered as Type 1 financial instruments businesses, trust banks or large-scale ordinary banks under the Banking Act often engage in private banking-like business. Overseas securities companies and banks carry out the main activities comprising said business in the form of Japanese subsidiaries for securities-related business or Japanese branches for banking business.

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

The laws specify standard processing times for applications and licences; for example, registering as a Type 1 financial instruments business operator under the FIEA is stipulated as taking two months from the date of formal application, while an application for a banking licence under the Banking Act takes one month from the date of formal application. However, in practice, it usually takes six months to a year and sometimes even longer, taking into account the time required for preliminary consultations with the authorities before making a formal application.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

When financial instruments business operators, etc intend to abolish their financial instruments business, merge or assign all or part of their business, they must, at least 30 days prior to the abolition date make a public notice to that effect in accordance with the provisions of the Cabinet Office Ordinance, post it in an easily publicly visible place in all of their business offices, and immediately notify the Prime Minister that this has been done.

In the case of a bank intending to make a resolution at the general shareholders' meeting regarding an amendment to the articles of incorporation relating to the discontinuation of a banking business or a dissolution of the bank, due to its public nature, this must be approved by the Prime Minister before it can take effect. If the approval is granted and the discontinuation becomes effective, a public notice will be issued and notices will be posted at all business offices.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Wealth management and private banking include a wide range of business activities, each regulated by its respective business laws. Engaging in the business of selling securities, derivatives, investment trusts, etc, requires a Type 1 financial instruments business operator registration, engaging in discretionary investment management business requires an investment management business operator registration, and engaging in investment advisory business requires an investment advisory business operator registration. In addition, carrying out banking business requires a banking licence under the Banking Act and carrying out trust business requires a trust license under the Trust Business Act or a permit under the Act on Engagement in Trust Business Activities by Financial Institutions. Once the relevant registration, licence or permit has been obtained, the relevant business operations will be subject to FSA or Local Finance Bureau supervision.

Discretionary management services and non-discretionary advisory service are regulated as separate businesses and require separate registrations, the registration requirements for the former being somewhat stricter than those for the latter.

Requirements

11 | What are the main licensing requirements for wealth management?

Like private banking, there is no legal definition for wealth management, so its licensing requirements may vary depending on the contents of the services an entity intends to provide.

If an entity intends to engage in Type 1 financial instruments business or discretionary investment management business, it needs to be registered by the Prime Minister but, if the following requirements are not met, such a registration will be refused: it must comprise, among others:

- sufficient human resources and business execution systems;
- it must be a joint-stock company or similar type of entity;
- having in-country business offices;
- keeping a certain level of assets (ie, the minimum amount of state capital or amount of net asset);
- its major shareholders are not certain disqualified individuals or companies; and
- not concurrently engaging in a prohibited business.

To engage in banking business, a banking business licence must be obtained, the examination for which will determine whether the following criteria are met: (1) the applicant has a sufficient financial basis to carry out a banking business soundly and efficiently, and the applicant's prospects for balancing related earnings and expenses are good, and (2) the applicant has the knowledge and experience to carry out this business accurately, fairly and efficiently in light of its personnel composition and other factors, and has sufficient social credibility.

To engage in trust business, it must obtain approval from the Prime Minister based on the Act on Engagement in Trust Business by Financial Institutions, the examination for which is based on the whether financial institution in question meets the following criteria: (1) it must have a sufficient financial basis for carrying out the trust business soundly and be able to carry out the trust business properly, and (2) its performance of this business must be unlikely to disturb the financial order.

12 What are the main ongoing conditions of a wealth management licence?

As the registration, licence, or authorisation is subject to revocation if any of the relevant requirements are no longer met, these must continue to be met. The Comprehensive Supervisory Guidelines for Major Banks, etc. (guidelines for the banking industry) focus on and clarify the supervision of the following aspects of private banking and wealth management business:

- setting sound and appropriate profit and business targets and supervising and controlling business operations;
- establishing a framework for supervising and controlling appropriate business operations,
- establishing an information management framework, etc;
- establishing a system for eliminating violations of laws and regulations and ensuring fair and appropriate transactions, etc; and
- establishing systems to detect and eliminate money laundering and suspicious transactions, etc.

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

Regarding money laundering, it is important to comply with the obligation to identify oneself under the Act on Prevention of Transfer of Criminal Proceeds and the Foreign Exchange and Foreign Trade Act, which obliges 'specified business operators' to identify their clients at the time of transactions, keep records of this identification, and report suspicious transactions, and many financial business operators are considered specified business operators. The latter requires banks and financial institutions to verify the identity of their clients. The Guidelines on Anti-Money Laundering and Combating the Financing of Terrorism, published by the FSA on 19 February 2021, are a code of conduct for financial institutions based on FATF recommendations and require them to implement risk mitigation measures based on customer due diligence and individual customer risk assessments in their various businesses.

Politically exposed persons

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

According to the Order for the Enforcement of the Act on Prevention of Transfer of Criminal Proceeds and its Enforcement Rules, foreign PEPs are defined as listed below. Transactions with foreign PEPs fall under the category of high-risk transactions and are subject to more stringent verification at the time of the transaction than would otherwise be the case. The relevant guideline states that enhanced due diligence on matters such as their position or purpose of transaction, etc. is desirable. There is no legal definition for domestic PEPs.

First group

Persons specified by the Ordinance of the competent ministry as being heads of a foreign state, occupying important positions in a foreign government, central bank or other similar organization of a foreign state, and persons who were formerly such persons as follows.

- Positions equivalent to the Prime Minister and other Ministers and Vice-Ministers of State in Japan.
- Positions equivalent to the Speaker of the House of Representatives, the Deputy Speaker of the House of Representatives, the Speaker of the House of Councillors or the Deputy Speaker of the House of Councillors in Japan.
- A position equivalent to that of a judge of the Supreme Court in Japan.
- Positions equivalent to ambassador extraordinary and plenipotentiary, minister extraordinary and plenipotentiary, representative of the Government or member of the plenipotentiary committee in Japan.
- Positions equivalent to the Chief of the Joint Staff, the Deputy Chief of the Joint Staff, the Chief of the Ground Staff, the Deputy Chief of the Ground Staff, the Chief of the Maritime Staff, the Deputy Chief of the Maritime Staff, the Chief of the Air Staff or the Deputy Chief of the Air Staff in Japan.
- Officers of the Central Bank.
- Officers of a corporation whose budget must be voted on or approved by Parliament.

Second group

A family member of a person listed in the first group (spouse (including persons whose marriage is not registered but who is in a situation similar to marriage; the same shall apply hereinafter in this item), parents, children, siblings, and parents and children of spouses other than these persons)

Third group

A juridical person who is specified by the Ordinance of the competent ministry as having a relationship that enables the person listed in the first group and second group to substantially control the management of its business.

Documentation requirements

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

When opening a bank account, one will usually be asked to provide one document bearing a photograph such as a driving licence or passport or two documents without a photograph, such as a health insurance card, pension book or seal registration certificate.

Also, one will be required to report one's place of residence and other personal information pursuant to FATCA and Act on Special Provisions of the Income Tax Act, Corporation Tax Act, and Local Tax Act Incidental to Enforcement of Tax Treaties.

According to the 'Guidelines on Anti-Money Laundering and Counter-Terrorist Financing', when a financial institution conducts a transaction with a client it must properly investigate and obtain basic information on the client, such as their identity and that of the beneficial owner of the organisation, the purpose of the transaction, and the flow of funds; this is considered standard in client due diligence.

Tax offence

16 | Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Although there is no such specific crime as money-laundering in Japan, the Act on Punishment of Organized Crimes and Control of Proceeds of Crime, article 2, paragraph 2 provides for the punishment for disguising, concealing, receiving, etc, the 'proceeds of crime', which are key provisions for the control of money laundering. The question of whether money laundering is a predicate offence depends on whether the 'proceeds of crime' include the proceeds of the offence. Following the 2012-revised FATF recommendation that tax offences should also be covered as predicate offences, the 2017 amendment to the Act includes offences for which a sentence of long-term imprisonment of more than four years or imprisonment is prescribed as 'proceeds of crime', which now also includes tax offences such as tax evasion.

Compliance verification

17 | What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

The Act on Prevention of Transfer of Criminal Proceeds Foreign Exchange and Foreign Trade Act requires confirmation of clients' identity, etc and transactions' purposes, etc, but there is no specific obligation to confirm clients' compliance with tax laws.

Liability

18 | What is the liability for failing to comply with money laundering or financial crime rules?

Clients or representatives must not misrepresent information relating to the confirmation at the time of transaction to the specified business operator and are subject to criminal penalties (imprisonment for not more than one year or a fine of not more than ¥1 million) in the event of a violation. If the administrative agency finds that a financial institution as a specified business operator is in breach of the provisions of the Act on Prevention of Transfer of Criminal Proceeds, it may order the financial institution to rectify the breach and, if the financial institution violates said order, it will be subject to criminal penalties (imprisonment for not more than two years or a fine of not more than ¥3 million).

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 | Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Although there is no specific criterion to distinguish private banking clients from non-private banking clients, the FIEA imposes financial regulations on financial instruments business operators by dividing investors into professional specified investors and other clients (general investors) based on their knowledge, experience, and wealth. There is also a procedure for making transfers between specific investors and general investors in certain cases, depending on the wishes of the investor. Foreign corporations are classified as specific investors, while foreign individuals are classified as general investors. A foreign individual may only make a transfer to a specified investor if (1) they have net assets of ¥300 million or more, (2) they have financial assets of an investment nature of ¥300 million or more, and (3) they have been trading with the relevant entity for at least one year.

Client categorisation

20 | What are the consequences of client categorisation?

There are no specific criteria to distinguish private banking clients from non-private banking clients. If a client is categorised as a specific investor, the regulations on conduct aimed at correcting information gaps, such as the delivery of pre-contractual documents, would not apply. A separate matter of whether a client is categorised as a specific investor or general investor is an important factor for assessing the suitability of the relevant products and transaction that will be conducted by the financial instruments business operator. Therefore, specific investors will have access to a greater variety of financial products and transactions than general investors.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

The Consumer Contract Act exists to protect the interests of individual consumers (unless they are party to a contract as or on behalf of a business). The determination of the governing law originally depended on the description in the contract but, in the case of consumer contracts, the law of the consumer's habitual place of residence is to be applied. In order to protect the interests of the consumer, the Consumer Contract Act provides protective provisions such as the invalidity of provisions unilaterally prejudicing the interests of the consumer and the prohibition of the provision of definitive information. Although it can be said that private banking is also affected by the Consumer Contract Act, as long as the counterparty is an individual, it is not considered to be more affected than other types of business.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

Domestic exchange businesses are regulated by the Banking Act and exclusively allowed for banks licenced in Japan. However, transfers of one million yen or less can be made with a fund transfer services registration. Those who engage in foreign exchange services must (1) confirm legality and identify themselves when conducting specified exchange transactions as defined in the Foreign Exchange and Foreign Trade Act. In cases where certain requirements are met, (2) reports on foreign exchange business must be submitted to the Minister of Finance via the Bank of Japan.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

When a financial institution suspects that one of its deposit accounts is being used for criminal purposes, taking into consideration the provision of information on the wrongful use of the deposit account, by the investigative agency and other circumstances, the financial institution shall take appropriate measures such as suspending transactions pertaining to the deposit account. In addition, financial institutions themselves set their own restrictions on deposit withdrawals.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

When transferring securities from a domestic securities account to a foreign securities account or vice versa, the financial instruments business operator's client must submit a notice to the financial instruments business operator stating their client information and the details of the transaction causing the transfer. There are no legal provisions regulating the withdrawal of non-deposit and non-security items (gold, checks, crypto assets, etc). The opening of deposit accounts and securities accounts is uniformly handled based on each firm's terms and conditions but the contents thereof vary from firm to firm.

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

While there are no provisions of confidentiality obligations specific to private banking, it is understood that financial operators generally assume obligations to keep clients' information confidential. In addition, financial operators must keep all clients' personal information confidential under the Act on Protection of Personal Information.

Scope

26 | What information and documents are within the scope of confidentiality?

Generally, any information provided by a client, whether before or after execution of a contract, is deemed necessary to be kept confidential. However, (1) information already known to the receiving party at the time of disclosure, (2) information already publicly available at the time of disclosure, (3) information entered in the public domain through no act of the receiving party after the time of disclosure and (4) information lawfully obtained by the receiving party without any obligation of confidentiality from a third party having a lawful right to disclose without any obligation of confidentiality to the disclosing party are generally excluded.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

Generally speaking, (1) disclosure to employees and officers of the parties to the agreement, (2) disclosure to affiliate companies of operators who provide services to the client pursuant to the agreement, and (3) disclosure required by laws and regulations are often considered exceptions.

Breach

28 | What is the liability for breach of confidentiality?

The detailed liability for breaches of confidentiality varies depending on the duty of confidentiality, if any, set forth in a contract with each client. Generally, the 'compensation for damage actually caused due to breach of confidentiality to the extent that a legally sufficient cause is found' is specified as such.

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

All the business laws governing the activities that constitute private banking are considered to be internationally applicable under the principle of territoriality if any part of the regulated activities (including soliciting, buying and selling) is conducted in Japan.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Depending on the type of business, if a foreign firm is determined by FSA as conducting a regulated activity in Japan, it will be considered as an unregistered or unlicensed illegal business unless the relevant licence or registration is obtained. Although, there are exceptional provisions that allow foreign firms to engage in securities trading, discretionary investment management, and investment advisory services without registration, provided that certain requirements are met, as the kind of business that can be conducted without registration is limited, whether the requirements necessary for the exceptions to apply are met should be carefully considered when conducting business without registration.

Regulation

31 | What forms of cross-border services are regulated and how?

Each service constituting private banking, including wealth management, advisory and banking services, is a regulated activity when it is conducted as a business in Japan. Although it is not clear how a foreign firm can be deemed to have 'conducted business in Japan', we believe that a foreign firm may be considered as 'conducting business in Japan' when it dispatches its employees to Japan or even when it conducts business remotely via email or telephone. Public business announcements addressed online to Japanese residents are considered acts of solicitation if there are no appropriate disclaimers or measures to prevent misidentification, and this may be judged as unregistered or unlicensed business.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

If a company is deemed to be conducting business in Japan, it will trigger the requirement of the relevant registration and aligning employees directly with clients or potential clients in Japan increases the likelihood that they will be determined to be conducting business in Japan.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Although there is no clear guideline for whether a person is judged to be operating a business in Japan, they may be judged to be operating an unregistered business. Although it depends on the contents of the document to be delivered, if an act falling under the category of solicitation is carried out in Japan, it may trigger the requirement of the relevant registration.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

Taxpayers and financial institutions may be required to disclose the account information to the tax authority via the following reporting system.

Overseas property report

Any individual tax resident of Japan (excluding non-permanent residents) who has more than ¥50 million in overseas properties as of 31 December of that year is, in principle, required to report such assets to the Japanese tax office by filing an 'overseas property report' by 15 March of the following year. This obligation applies as long as the aforementioned conditions are met, regardless of whether the taxpayer has tax liability in Japan for that year. The information required includes the types of overseas property owned by the taxpayer and its amounts and values. This reporting system does not apply to domestic private banking accounts as it only targets foreign property, and whether bank accounts are classified as domestic property is determined according to the location of offices and places of business of financial institutions in which the bank accounts are placed.

Property and liability report

Any individual tax resident of Japan who has an obligation to file tax returns is, in principle, required to file a 'property and liability report' to the Japanese tax office upon satisfying both following conditions: (1) the taxpayer's taxable income before applying certain income deductions for that year exceeds ¥20 million and (b) the taxpayer owns in total ¥300 million or more of property or ¥100 million or more of a certain property being subject to Japanese Exit Tax as of 31 December of that year. The filing deadline is 15 March of the following year and the information required includes the types of property owned by the taxpayer and its amounts and values as well as the amount of the taxpayer's liabilities. Therefore, if a taxpayer owns private banking accounts, whether domestic or foreign, and satisfies the aforementioned conditions, they will be required to report the assets' details to the Japanese tax office via a Property and Liability Report.

Common reporting standard

Under the common reporting standard (CRS), financial institutions report non-residents' bank account information to the tax authority of their own countries and said information is automatically shared with the residential countries of those non-residents according to the agreements for the exchange of CRS information between the two countries in order to combat international tax evasion and tax avoidance utilising foreign bank accounts. Therefore, information of foreign private banking accounts that tax residents of Japan hold in foreign financial institutions may be shared with the Japanese tax authority if the country where such foreign financial institutions are located has also joined the CRS.

Tax audit in Japan

In general, the Japanese tax authority has a right to ask business entities to cooperate with it for its tax audits by providing the necessary information of taxpayers being investigated. Therefore, financial institutions that hold individual taxpayers' private banking accounts may disclose such account information as the number of bank accounts the taxpayer holds, transaction history and outstanding balance, to the tax authority, if necessary for the tax audit.

Reporting requirements

35 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Under the Act on Prevention of Transfer of Criminal Proceeds, if a specified business operator suspects that property is profit from crime in a transaction related to the specified business or that a customer is committing a crime under the Organised Crime Control and Prevention Act, article 10 in relation to transactions related to the specified business, the specified business operator must submit a notification to the competent administrative agency and financial institutions that make payments to a foreign country at the request of a client are required to notify the competent administrative agency during the financial period in which the payments are to be sent of the identification and other matters pertaining to the customer. The Japanese and US authorities have issued a statement on mutual cooperation and understanding between them for FATCA compliance, outlining the procedures to be implemented by financial institutions in Japan. At the request of the Japanese and US authorities, clients are asked to confirm whether they are a US taxpayer when they open a new account. As a result, if the client is an American the deposit account information will be reported to the US tax authorities with the consent of the customer. Similar regulations are also provided in the Act on Special Provisions of the Income Tax Act, Corporation Tax Act and Local Tax Act Incidental to Enforcement of Tax Treaties.

Client consent on reporting

36 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

No client consent is required if the company has a duty to report or notify the authorities based on laws and regulations.

STRUCTURES

Asset-holding structures

37 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

It is common in Japan that holding private assets is delegated to asset management companies, general incorporated foundations, general incorporated associations or trusts. While asset management companies are generally used to hold private assets, the entity which is delegated to hold private assets depends on the nature of assets to be managed. In the case of an asset management company, favourable tax treatment can be generally enjoyed but there are, as disadvantages, relatively high costs to establish and operate the asset management company and income tax on capital gain likely to be imposed on assets transferred from a client to an asset management company. In the case of a general incorporated foundation or association, the advantages are favourable tax treatment and opportunities to carry out public benefit services by using private assets. In the case of a trust, rights and obligations-related matters can be flexibly set by the contents of a trust agreement. Civil trusts that can flexibly manage assets have recently gained attention.

Know-your-customer

38 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

For a business operator to conduct appropriate distribution and solicitation activities taking each client's suitability into account, the business operator needs to know the attribution of clients. However, no specific obligation to check or attempt to check the attribution of clients are generally specified in the FIEA. In contrast, the JSDA requires in its rules that its members obtain client cards from clients before executing transactions with them. Pursuant to the rules, the 'name, address, location and contact information, date of birth, occupation, investment purpose, asset conditions, any investment experience, transaction type, reason for becoming a client and any other matters as JSDA deems necessary' must be stated in such client cards.

Controlling person

39 What is the definition of controlling person in your jurisdiction?

A 'controlling person' refers to a 'person who has a relationship in which the person may actually control the business operation of a corporation'. In the case of a corporation which grants voting rights in proportion to the contribution amount, (1) if there is a natural person who holds voting rights exceeding 25 per cent of the total voting rights, this is a natural person, (2) if there is no such natural person, this is a natural person who exerts a dominant influence on the business activities of the corporation, or (3) if there are no such natural persons listed above, this is a natural person who represents the corporation and executes its businesses. In the case of a corporation other than the above type, (1) if there is a natural person who receives dividends exceeding 25 per cent of the total revenue of the corporation, this is the natural person, (2) if there is no such natural person, this is a natural person who exerts a dominant influence on the business activities of the corporation, or (3) if there are no such persons listed above, this is a natural person who represents the corporation and executes its businesses.

Obstacles

40 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

If private assets are intended to be held through a special purpose company (SPC), it is important that certain requirements to avoid double taxation are satisfied.

CONTRACT PROVISIONS

Types of contract

41 Describe the various types of private banking and wealth management contracts and their main features.

Typically, contracts for the relevant services are prepared by each financial instruments business operator in its own format. The parties have the choice of governing law and many contracts specify the laws of Japan as the governing law.

Liability standard

42 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

Under the Civil Code, whether negligence or gross negligence, an act based on negligence might cause liability for default under contract. This point may be changed subject to an agreement between parties. Some relevant regulations have provisions easing burden of proof by letting the amount of damages be presumed in a certain manner. In addition, sometimes parties add provisions for liquidated damages to the contractual liabilities clause through negotiation to eliminate any obstacle or inconvenience incidental to the burden of proof. In contract forms used by financial operators, there are often provisions to release liabilities for negligence other than gross negligence.

Mandatory legal provisions

43 Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

As there are neither regulations that apply only to private banking nor mandatory legal provisions on disclosure or document form that apply only to private banking, private banking is governed by business laws regulating individual activities such as discretionary investment management and deposit operations performed as part of private banking. Under the FIEA, as a general rule, documents explaining transaction details must be delivered to a client before and upon execution of the relevant contract, and the items to be stated and the form are set forth in detail by laws and regulations.

Limitation period

44 What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

As there is no limitation period specific to claims under a private banking contract, this is governed by the provisions of the Civil Code applicable to other types of contracts. As a general rule, a claim under a contract is extinguished by prescription on the date on which five years have passed since the date on which the claim holder becomes aware of its right to exercise the claim or on the date on which 10 years have passed since the date on which the claim holder may start to exercise the claim. The extinctive prescription period cannot be changed by executing a contract. Essentially, if legal procedures are taken or an agreement to discuss is reached, the limitation period is tolled for a certain period of time.

DISPUTES

Competent authorities

45 What are the local competent authorities for dispute resolution in the private banking industry?

In addition to ordinary courts, as an alternative dispute resolution (ADR) system, the Financial Instruments Mediation Assistance Center (FINMAC) renders the financial ADR service as delegated by financial instruments business associations as self-regulatory institutions under the Financial Instruments and Exchange Act and other self-regulatory institutions and services under a certified investor protection body system as the cross-industry system. Further, other dispute resolution

institutions designated by the FSA Commissioner render services for dispute resolution, etc, and for complaint handling procedures. As designated dispute resolution institutions, FINMAC has been designated for the Type 1 financial instruments business, the JBA for banking business, and The Life Insurance Association of Japan, etc, for insurance business. If one or several dispute resolution institutions are designated for the relevant type of dispute resolution or service of a financial instruments business operator, the operator is required to execute a basic contract for implementation of dispute resolution procedures with one of the institutions.

Disclosure

46 | Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

If a financial instruments business operator becomes aware of a violation of laws by any of its officers or employees, the operator is required to report the violation to the local regulator. Additionally, a client can also lodge a complaint with the local regulator. If the complaint is deemed justifiable, the local regulator normally demands explanations or information from the operator or inspects and investigates the operator.

UPDATE AND TRENDS

Recent developments

47 | Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

Amendment to the scope of business regulation of banks

Banks are subject to a strict scope of business regulations in terms of, among other things, eliminating other business risks. Until now, banks or banking groups have been allowed to own subsidiaries or sibling companies ('advanced banking companies') that carry out 'certain advanced activities', subject to the approval of the Commissioner of the Financial Services Agency, but the requirements for this approval have been relaxed. A wide range of operations are considered to fall within the scope of the 'certain advanced activities' to be relaxed, including (1) fintech, (2) sales of apps and IT systems developed for the bank's own group, and (3) advertising, promotion, research, and analysis and provision of information. Banking groups will be able to use their ingenuity to offer a wider range of services to their customers by utilising their own management resources, which is expected to further deepen the digitalisation of the services offered by banking groups.

Introduction of financial service brokerage business across industries

The Act on Sales, Etc. of Financial Instruments was revised to introduce a financial service brokerage business, resulting in the brokerage businesses for banking, securities, and insurance now being permitted to be carried out with a single registration as financial service brokerage business, and cross-selling activities across several industries have been facilitated. Furthermore, intermediary services under this revision are recognised as being provided via electronic data processing systems and other information and communication technologies and online and non-face-to-face electronic financial services intermediary services using terminals such as smartphones and tablets to conduct transactions via the web and applications are expected to become more active.

E-KYC

One area where fintech is impacting on private banking and wealth management services is E-KYC. Amendments to the Act on Prevention of Transfer of Criminal Proceeds in 2018 made it possible to electronically verify a person's identity online by, for example, sending an identity card photographed using special software (such as app or website) or reading the IC chip on an ID card using an app. It has been pointed out that the identification obligations under the old law imposed a cost and procedural burden on both customers and financial institutions, and that the introduction of E-KYC has led to customers' active participation in financial transactions and reduced costs for financial institutions. It is currently being introduced in many financial institutions, including banking groups.

Liechtenstein

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PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 | What are the main sources of law and regulation relevant for private banking?

The main sources of law and regulation relevant for private banking are statutory legislation passed by parliament and ordinances issued by the government, as well as directly applicable EU legislation. Furthermore, the Financial Market Authority Liechtenstein (FMA), as competent authority, may issue instructions relevant for financial intermediaries in Liechtenstein. As the Principality of Liechtenstein is an active member of the European Economic Area (EEA), the main sources of law regarding wealth management are heavily influenced by EU law.

Private banking services are first and foremost subject to civil law and the contractual relationship between the intermediary and the client, and therefore to the General Civil Code and the Law on Property (SR). Structures and vehicles used for wealth and estate planning purposes are subject to the Liechtenstein Persons and Companies Act of 20 January 1926.

Second, the contractual relationship is influenced and organised by public law and regulation. In the field of private banking this is particular to banking and asset management regulation, as well as regulation of trustees and fiduciaries.

Liechtenstein Banks are regulated under the Liechtenstein Banking Act and Banking Ordinance, which is transposing and complementing the EU regulatory framework covering banks and investment firms (in particular the Capital Requirements Directive and Capital Requirements Regulation framework as well as the EU Markets in Financial Instruments Directive (MiFID) and Markets in Financial Instruments Directive framework). EU law provides for a number of directly applicable regulations in this regard, most importantly, Regulation (EU) No. 575/2013.

Other wealth management services, such as individual portfolio management and investment advice with regard to financial instruments, are regulated under the Liechtenstein Asset Management Act and Asset Management Ordinance, as well as, the BankG, all of which are transposing in particular the EU MiFID II framework. EU law provides for a number of directly applicable regulations in this regard.

Trustees and trust companies in Liechtenstein are regulated under the Professional Trustees Act, and are also subject to oversight by the Liechtenstein Institute of Professional Trustees and Fiduciaries, which is a public law corporation that safeguards the honour, reputation and rights of trustees and supervises their duties.

Collective investment schemes (CISs) and insurance contracts may also be used for private wealth management purposes. CISs are regulated predominantly under the Liechtenstein AIFM-Act (AIFMG) and UCITS-Act. Both laws transpose EU regulation and are accompanied by a number of directly applicable EU regulations. For CISs outside the AIFM and UCITS framework, in particular for collective investment of families and investment clubs, the Liechtenstein Law of Investment Undertakings is applicable. Insurers in Liechtenstein are, inter alia, subject to the Insurance Supervision Act and Insurance Contract Act.

Regulatory bodies

2 | What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The main government body relevant for financial regulation in Liechtenstein is the Ministry for General Government Affairs and Finance, and, in particular, the Office for Financial Innovation. The main regulatory body in Liechtenstein is the Financial Market Authority (FMA).

The most important industry associations in the field of private banking and wealth management are:

- the Liechtenstein Bankers Association;
- the Liechtenstein Institute of Professional Trustees and Fiduciaries;
- the Liechtenstein Association of Independent Asset Managers;
- the Liechtenstein Investment Fund Association;
- the Liechtenstein Chamber of Lawyers;
- the Liechtenstein Insurance Association; and
- the Association of Liechtenstein Charitable Foundations.

Private wealth services

3 | How are private wealth services commonly provided in your jurisdiction?

The most important providers of private banking and wealth management services in Liechtenstein are fiduciaries, banks (which traditionally focus on private banking services) and asset managers. However, fund management companies and insurers also offer private wealth management solutions. Liechtenstein law provides for a variety of structuring options for private wealth management purposes, inter alia, the foundation and the trust.

Definition of private banking

4 | What is the definition of private banking or similar business in your jurisdiction?

Liechtenstein law does not provide for a definition of 'private banking'. The regulation of banks and other wealth management services in Liechtenstein is harmonised under EU law and thus depends on the specific services provided.

Licensing requirements

5 | What are the main licensing requirements for a private bank?

Banks are subject to prudential regulation. Licensing requires a sound internal organisation and a proper business operation. The intermediary

must provide a business plan that outlines the details of the organisation, which is mapped out by the legislator. Organisational requirements are applied with regard to the size of the institution and the nature of its business and the services provided. The minimum initial capital of a bank under Liechtenstein law amounts to at least 10 million Swiss francs. One of the most important licensing requirements is that intermediaries must have their head office located in Liechtenstein and must be organised in a permitted legal form. Furthermore, there is a requirement to have an investor compensation scheme in place. The key personnel of the intermediary (board of directors and management body as well as the head of the internal audit department) must be fit and proper and thus must be sufficiently qualified with respect to their education and experience in the sector and must be of good repute. There is also an eligibility requirement with regard to shareholders with qualifying holdings. Further licensing requirements are provided by law.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

The preconditions of granting a licence must be fulfilled on an ongoing basis. Changes with regard to certain aspects of the organisation are subject to prior approval by or notification to the FMA. The licensee is subject to ongoing supervision as well as reporting and record-keeping requirements.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

Under Liechtenstein law, banks may be organised as a limited company (AG) or as a EU company (SE). In justified cases the government may allow other legal forms. Foreign banks may establish a subsidiary or branch in Liechtenstein under the applicable legal provisions.

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

There is no specific licence for a private bank; however, with regard to a licence as a bank or investment firm the Financial Markets Authority (FMA) must decide within six months after the receipt of the application if the dossiers are complete, and in any event within 12 months after the receipt of the application. With regard to a licence as an asset manager under the Liechtenstein Asset Management Act (VVG), the Liechtenstein FMA must decide within six months after the receipt of the application if the dossiers are complete.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

The licence expires when the respective business activities have not been taken up within one year of the licence being granted or no business activities have been conducted for a period of at least six months. The licence furthermore expires when bankruptcy proceedings are legally initiated or the legal entity is removed from the commercial register.

The FMA may withdraw a licence if the requirements for authorisation are no longer met or the licensee fails to meet specific legal requirements (eg, with regard to own funds or liquidity). Furthermore, the FMA may withdraw a licence if legal obligations have been seriously violated. The FMA may revoke a licence if material circumstances were not disclosed or the licence was obtained on the grounds of incorrect information. Lastly, the licence may be renounced.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Providers of specific wealth management services, such as individual portfolio management on a discretionary client-by-client basis or investment advice with regard to financial instruments, are subject to supervision and licensing. In the case of asset managers, these business activities are regulated under the VVG and Asset Management Ordinance. Investment firms are subject to the Liechtenstein Banking Act (BankG). A licence as a bank under the BankG may also allow for the provision of such wealth management services.

Requirements

11 | What are the main licensing requirements for wealth management?

Investment firms and asset managers are subject to prudential regulation. In its basic features, the licensing requirements are quite similar to those of banks; however, the requirements show consideration for the size of the institution and the services provided. The minimum initial capital of investment firms under the Liechtenstein BankG amounts to at least 730,000 Swiss francs, while asset managers licensed under the VVG must have a minimum initial capital of at least 100,000 Swiss francs.

12 | What are the main ongoing conditions of a wealth management licence?

The preconditions of granting a licence must be fulfilled on an ongoing basis. Changes with regard to certain aspects of the organisation are subject to prior approval by or notification to the FMA. The licensee is subject to ongoing supervision as well as reporting and record-keeping requirements.

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 | What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

Liechtenstein has attached great importance to anti-money laundering (AML). As a European Economic Area member, Liechtenstein regularly implements the respective euorpean legal acts into national law.

Banks and investment firms licensed under the Liechtenstein Banking Act (BankG) as well as asset managers licensed under the Asset Management Act are subject to due diligence requirements according to the Due Diligence Act and the accordant ordinance, implementing the EU directives on money laundering. Such requirements include:

- the identification and verification of the identity of the client;
- the identification and verification of the identity of the beneficial owner of the assets;
- the establishment of a business profile; and
- risk-adequate monitoring of the business relationship.

The verification of the identity of clients regularly takes place within the scope of personal meetings. In this regard, the financial intermediary shall inspect the passport, identity card, driving licence or certified copies thereof, and collect further specific information on the client. Under specific conditions, financial intermediaries may undergo an

online verification process instead of verifying the client in a personal meeting (eg, video conference). For the verification process of the identity of the beneficial owner, Liechtenstein law provides blank forms to be completed containing information on the beneficial owner. The business profile shall contain, inter alia, information on the economic background and origin of the assets deposited.

Increased due diligence requirements may apply in specific cases specified by law.

Politically exposed persons

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

A PEP is defined as a natural person who is, or was up until one year ago, entrusted with a prominent public function, as well as his or her immediate family members, or a person known to be a close associate of such a person. Such prominent public functions include, but are not limited to:

- heads of state;
- heads of government;
- ministers and deputy or assistant ministers and senior officials of political parties;
- members of parliaments;
- members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal, except in exceptional circumstances;
- members of courts of auditors or of the boards of central banks;
- ambassadors, chargés d'affaires and high-ranking officers in the armed forces; and
- members of the administrative, management or supervisory bodies of state-owned enterprises.

Increased due diligence measures apply to business relationships and transactions with PEP. The financial intermediaries mentioned above shall establish additional measures by implementing adequate risk-based procedures to determine whether the contracting party or the beneficial owner is a PEP or not, obtaining the approval of at least one member of the management before establishing a business relationship with a PEP as contracting party or beneficial owner or – where a contracting party or a beneficial owner is recognised as a PEP in the context of an existing business relationship – before continuing the business relationship. Each year, at least one member of the management shall approve the continuation of the business relationships with a PEP.

Documentation requirements

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

Financial intermediaries are required to collect certain customer and beneficial owner information before establishing a private banking relationship. The minimum information required for private individuals includes the full name, date of birth, residence and citizenship. The information required for legal entities includes the name or firm, type of legal entity, registered office, date of establishment, and date and place of entry in the public register, as well as the names of the bodies or trustees formally acting on behalf of the legal entity in dealings with the banks and wealth managers. This information must be proved by a valid official identification document with a photograph (in particular a passport, identity card or driving licence). Legal entities need to provide an extract from the commercial register or a similar document. To establish a business profile, banks and wealth managers must obtain information on the economic background and origin of the assets deposited, the profession and business activity of the effective depositor of the assets and the intended use of the assets, as well as authorised agents and bodies in contact with banks and wealth managers. In practice, financial intermediaries require more detailed information for account opening on a case-to-case basis.

Tax offence

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Yes. Tax offences are predicate offences for money laundering. The respective legal provisions have recently been revised to the effect that acts punishable by more than one year of imprisonment qualify as predicate offences for money laundering. Further, other specific crimes are covered from the scope of the predicate offences. In practice, the main predicate offences that may apply in the context of private banking are fraud and breach of trust.

Compliance verification

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

An internal directive by the Liechtenstein Banking Association relating to due diligence measures with regard to the tax compliance of their clients requires banks to verify the tax compliance of their clients. Other financial intermediaries also undertake different measures to verify the tax compliance of their clients (eg, requesting tax compliance confirmations issued by the clients or their tax advisers).

Liability

18 What is the liability for failing to comply with money laundering or financial crime rules?

Financial intermediaries (private bank or wealth management institution and its employees) that fail to comply with due diligence measures under the Due Diligence Act either face criminal prosecution (a prison sentence of up to six months or a fine of not more than 360 times the daily fine rate set by the court) or administrative procedures (a fine of up to 200,000 Swiss francs; in cases of repeatedly or systematically committed administrative offences up to 5 million Swiss francs), depending on the type of failure.

Clients and financial intermediaries committing financial crimes under the Criminal Act can face criminal prosecution (prison sentence or fine). Civil liability may also arise from the failure to comply with money laundering or financial crime rules.

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Liechtenstein law distinguishes between types of clients in banking and investment law in line with EU law. According to Annex 1 BankG and Annex II Markets in Financial Instruments Directive (MiFID) II, respectively, a distinction is made between eligible counterparties, professional clients and non-professional clients. High-net-worth individuals (HNWIs) as well as private wealth management vehicles may qualify as professional clients or non-professional clients.

The legally provided classification may be altered if the client wishes to waive the benefit of more protective regulation and there is reasonable assurance that the client is capable of understanding the risks involved (opt up). This may, however, only be assumed if the client passes at least two of the three following tests:

- the client has over the previous four quarters carried out an average of 10 transactions of significant size on the relevant market;
- the client has a financial instrument portfolio, including cash deposits and financial instruments, exceeding €500,000; and
- the client has substantial professional experience, namely, works or has worked for at least one year in a professional position in the financial sector, which requires knowledge of the envisaged transactions or services.

The law also provides professional clients and eligible counterparties to opt for higher regulatory protection and classify as non-professional client (opt down).

Furthermore, Liechtenstein law in the field of collective investment, specifically in the Alternative Investment Fund Managers Directive (AIFMG) and Law on Investment Undertakings (IUG), distinguishes between types of clients, in particular between professional investors, non-professional investors and qualified investors.

Client categorisation

20 | What are the consequences of client categorisation?

The primary consequence of the client segmentation is the applicable level of investor protection. In particular, the duties with regard to information and advice or suitability are lighter when dealing with professional clients. Those duties, however, also depend on the specific services provided. In the law on collective investment specific products are only available for professional investors.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

General consumer protection legislation, such as the Liechtenstein Consumer Protection Act (KSchG), may be applicable to financial services. With regard to the distance marketing of financial services to consumers, the Act on Distance Marketing for Financial Services to Consumers (FernFinG) specifically applies.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

Not applicable.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

Under specific circumstances, the Financial Market Authority may impose such restrictions. Banks may impose such restrictions or demand an advance notice if larger amounts are withdrawn. In particular, banks may refuse incoming and outgoing cash payments of a higher amount (eg, 10,000 Swiss francs) in specific cases.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

Under specific circumstances, the Financial Market Authority may impose such restrictions. Banks may impose such restrictions or demand an advance notice if larger amounts are withdrawn. In particular, banks may refuse incoming and outgoing cash payments of a higher amount (eg, 10,000 Swiss francs) in specific cases.

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

Liechtenstein banks and other financial intermediaries are subject to the Liechtenstein data protection legislation. Furthermore, there is specifically stipulated banking secrecy that prevents the passing on of information that was obtained owing to a banking relationship and a specific protection of trustee secrecy. Duties of confidentiality may also stem from the contract between service provider and client.

Scope

26 | What information and documents are within the scope of confidentiality?

All information that banks and their employees are entrusted with or otherwise obtain owing to the business relationship with a client are subject to the specifically stipulated banking secrecy provisions.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

The fulfilment of a legal obligation to provide information to third parties (eg, to give testimony or information to criminal courts and supervisory bodies as well as provisions regarding cooperation with other supervisory bodies) is not deemed to be a violation of banking secrecy. There is, however, no time limit with regard to banking secrecy.

Breach

28 | What is the liability for breach of confidentiality?

The violation of secrecy obligations pursuant to the BankG is punishable by a term of imprisonment of up to three years. If damages are caused by the breach of confidentiality, civil liability may also be incurred.

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

Banks and investment firms from the European Economic Area (EEA) have access to the market in Liechtenstein based on the freedom to provide cross-border financial services upon receipt of a notification by the local regulator (passporting).

Banks and investment firms from third countries (outside the EEA) providing private banking services into Liechtenstein on a cross-border basis must establish a Liechtenstein branch in order to actively approach clients in Liechtenstein. Without establishing a local branch, banks and investment firms outside the EEA may only provide private banking services to clients in Liechtenstein on a reverse solicitation basis. However, the applicability of reverse solicitation is limited.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Yes. Banks and investment firms outside the EEA providing banking services (eg, accepting deposits, lending, opening bank accounts) to clients in Liechtenstein on a cross-border basis require a banking licence. The only (very limited) exception is reverse solicitation.

Regulation

31 | What forms of cross-border services are regulated and how?

The provision of all cross-border wealth management, advisory and banking services provided for by law to Liechtenstein clients is regulated.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

If certain licensing or notification requirements are complied with, employees of foreign private banking institutions may travel to meet clients and prospective clients in Liechtenstein.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

If certain licensing or notification requirements are complied with, employees of foreign private banking institutions may send documents to clients and prospective clients in Liechtenstein.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 | What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

If the private banking account is subject to taxation in Liechtenstein, individual taxpayers are obliged to disclose domestic and foreign private banking accounts to the tax authority. Individual advice should be sought.

Reporting requirements

35 | Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Financial intermediaries may be obliged to report on the grounds of anti-money laundering suspicion. Further information must be provided under international treaties on exchange of information, such as the US Foreign Account Tax Compliance Act or the Organisation for Economic Co-operation and Development's Automatic Exchange of Financial Account Information.

Client consent on reporting

36 | Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

No. The client must be informed and may request the reporting Liechtenstein financial institution to correct or delete incorrect information to be exchanged.

STRUCTURES

Asset-holding structures

37 | What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

Liechtenstein has strong international connections from both business and legal perspectives. The legal system offers a broad range of structuring possibilities that are attractive to clients from different jurisdictions. Besides corporate vehicles for wealth management purposes, commonly known in central European jurisdictions, Liechtenstein law offers several vehicles, which are tailored with regard to wealth management purposes. Liechtenstein thus has a very expedient and viable foundation law as well as its own trust law, which dates back to 1926.

The most commonly used structures for private wealth management purposes in Liechtenstein are:

- the Liechtenstein foundation;
- the Liechtenstein trust; and
- other corporate vehicles such as the Liechtenstein establishment.

In addition, investment funds (private label funds) and insurance products are commonly used for wealth management purposes. The benefits and risks of each structuring option depend strongly on the objectives pursued. The foundation and the trust, however, both offer specific advantages with regard to asset protection purposes, if structured accordingly.

Know-your-customer

38 | What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

Liechtenstein's KYC regime requires the identification of the contracting party (ie, the legal entity as well as their beneficial owners)). When creating a business profile, service providers must, inter alia, inquire into the source of funds, economic background and purpose of funds of the client.

Controlling person

39 | What is the definition of controlling person in your jurisdiction?

Within the meaning of the Liechtenstein due diligence law, control, both for corporations, foundations and trusts as well as foundation-like establishments, is defined as:

- the power to dispose of the assets of the legal entity;
- to amend the provisions governing its essential nature; or
- to amend the beneficiaries.

Control is also given if a person is able to influence the exercise of those aforementioned control powers.

Obstacles

40 | Are there any regulatory or tax obstacles to the use of structures to hold private assets?

Any structuring under Liechtenstein law must observe the requirements and formalities that the legislator imposes with regard to their establishment and maintenance in order to avoid personal liabilities or nullity. Any contract that violates a legal prohibition or that is contrary to accepted principles of morality is void. Other limits and obstacles, as well as structuring possibilities, depend on the specific situation as well as on the objective of the structure (eg, if a structure makes use of the status of a private asset structure it may not carry out commercial activities). In general, it is advisable to consult a tax adviser to analyse the specific situation.

CONTRACT PROVISIONS

Types of contract

41 | Describe the various types of private banking and wealth management contracts and their main features.

According to the principle of freedom of contract, Liechtenstein law does not provide for a conclusive list of private banking and wealth management contracts. In practice, there are various types of private banking and wealth management contracts, such as asset management agreements and investment advisory agreements. Banks and wealth management institutions use general terms and conditions applicable to the private banking contracts with clients.

Private banking contracts often contain a choice of law clause. Liechtenstein law only provides for limited restrictions on the validity of the choice of law clause, but, especially for consumer protection reasons, such restrictions exist.

Liability standard

42 | What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

Liability for a breach of private banking contract under Liechtenstein law is provided by civil law. Clients may claim from banks or wealth management institutions compensation for damages caused by wilful or negligent breach of private banking contracts. The extent of the claim for damages depends on the fault (wilful or negligent). In the case of claiming damages by breach of contract, banks and wealth management institutions are required to prove that there is neither wilful nor negligent causation of damages. The liability of banks or wealth management institutions against consumers may only be excluded in the event of slight negligence behaviour. But also, in other cases, the exclusion of liability for wilful or gross negligence behaviour might not be valid.

Mandatory legal provisions

43 | Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

Banks and investment firms must observe numerous and detailed rules of conduct, including rules on disclosure, notice, form and content thereof as stipulated in the BankG and VVG. Asset managers are specifically obliged to conclude a written agreement with clients on the rights and obligations and other conditions (article 18 of the VVG).

Limitation period

44 | What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The limitation period for claims in connection with the procurement of financial services transactions is three years from the date of knowledge of the damage and the party causing the damage, and in any event, 10 years from the date on which the transaction was effected or the service provided. The limitation period for potential other claims for damages in relation to a private banking or wealth management contract is three years from the date of knowledge of the damage and the party causing the damage and will be extended to 30 years in the case of specific criminal behaviour. Further, specific limitation periods may apply, individual advice should be sought.

The waiver of the limitation period is not possible in advance – only under specific conditions upon the occurrence of damages.

DISPUTES

Competent authoQities

45 | What are the local competent authorities for dispute resolution in the private banking industry?

Clients and financial intermediaries may contact the conciliation board in order to resolve disputes without the involvement of the court. The conciliation board promotes discussions between the involved parties, and submits a negotiated solution to the parties. The parties are not bound by the solutions proposed by the conciliation board. Thus, they are free to accept the proposed solution or initiate court proceedings.

Court proceedings between clients and financial intermediaries take place at the civil court. The ordinary civil procedure rules apply for these proceedings.

Disclosure

46 | Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

A client may lodge a complaint with the local regulator in the event of a breach of supervisory legislation by the financial intermediary. The failure to comply with supervisory law may be punishable under criminal, administrative and civil law. However, disputes between clients and financial intermediaries under civil law are not subject to automatic disclosure to the local regulator.

UPDATE AND TRENDS

Recent developments

47 | Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

Fintech has been an important factor in the development of the banking market over the recent years. Liechtenstein has emerged as an important fintech and blockchain hub. Adapting to the growing importance of blockchain technology, token economy and crypto assets, Liechtenstein has introduced comprehensive trailblazing legislation with the Token and Trusted Services Providers Act (TVTG). Nevertheless, established banks with high-quality financial services and a focus on private wealth

management remain the most important market participants. Fintech complements the service offering and is perceived as an opportunity by investors and service providers alike.

Liechtenstein has for years prioritised the fight against money laundering and terrorist financing. In its recently published 5th Country Report on Liechtenstein, MONEYVAL acknowledges the country's high efficiency in identifying and combating money laundering and terrorism risks.

Switzerland

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PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 What are the main sources of law and regulation relevant for private banking?

The Swiss legislation relevant for private banking and wealth management comprises a number of legal and regulatory instruments, the applicability of which depends on the actual services offered by the wealth manager. In terms of ranking from the least regulated to most regulated, the services may be listed as follows: advisory, portfolio management (without custody of client assets), portfolio management for collective investment schemes, securities dealing (including brokerage services) and finally banking (including custody and lending). The main statutes relevant for private banking are:

- the Banking Act;
- the Collective Investment Schemes Act;
- the Swiss Financial Market Supervisory Authority Act;
- the Anti-money Laundering Act (AMLA);
- the Financial Services Act of 2020 (FinSA); and
- the Financial Institutions Act of 2020 (FinIA).

These statutes are supplemented by ordinances enacted by the Swiss Federal Council or, as regards more technical aspects, by the Swiss Financial Market Supervisory Authority (FINMA). Their practical application is further regulated by a number of FINMA circulars.

The FinIA and the FinSA, which both entered into force on 1 January 2020, considerably overhauled the applicable legal and regulatory framework (in particular, as applicable to wealth managers) in the financial sector.

Regulatory bodies

2 What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

Under Swiss law, banks are subject to licensing requirements and the ongoing supervision of FINMA. Since 1 January 2020, entities or individuals providing wealth management services (discretionary and non-discretionary advisory services) are newly subject to prudential supervision in Switzerland. If wealth management activities are conducted in connection with collective investment schemes, or the wealth manager offers securities dealing or brokerage services or manages assets of Swiss pension funds, such activities are further subject to specific regulations. Wealth managers that manage their clients' assets or execute investment transactions as investment advisers are also characterised as financial intermediaries and, as such, are in addition subject to the Swiss anti-money laundering regulations.

In terms of supervisory authorities, FINMA is an independent and single integrated authority for the Swiss financial markets, which is responsible for the supervision of banks, securities firms, stock exchanges and collective investment schemes. It further monitors the private insurance sector. FINMA's activities are overseen in turn by the Swiss parliament and, although it carries out its activities independently, FINMA has a duty to report to the Swiss Federal Council.

Under the FinIA, wealth managers and trustees acting in a professional capacity are now also subject to FINMA licensing and enforcement. That being said, their day-to-day supervision is entrusted to supervisory organisations (SOs) approved and monitored by FINMA. As of 25 May 2022, five SOs were licensed, namely the Organisme de Surveillance des Instituts Financiers (OSIF), the Organisation de surveillance financière, AOOS - Schweizerische Aktiengesellschaft für Aufsicht, FINcontrol Suisse AG and the Supervisory Organisation for Financial Intermediaries & Trustees (SO-FIT).

Financial intermediaries subject to the AMLA are required to be registered with a self-regulatory organisation (SRO) recognised by FINMA, unless they are subject to licensing and supervision directly by FINMA, such as banks and other regulated firms. With respect to wealth managers who are to be licensed under the new FinIA since 1 January 2020, those are, to pursue their activities, to be registered with an SRO, as long as they have not obtained their licence within the three-year transitional deadline. The SROs are responsible for monitoring their members as regards their compliance with their obligations under the Swiss anti-money laundering regulations. The SROs are in turn subject to FINMA authorisation and supervision.

In addition, given the high degree of self-regulation in Switzerland in the private banking and wealth management sector, the primary SROs active in those markets need to be mentioned and include: (1) the Swiss Bankers Association; (2) the Asset Management Association Switzerland (replacing the former Swiss Funds and Asset Management Association (SFAMA) and the former Asset Management Platform Switzerland (AMP)) and (3) the Swiss Asset Managers' Association (VSV/ASG). Some of the codes of conduct and guidelines issued by those bodies have been recognised by FINMA as minimum standards for the relevant industry and apply to all firms active in the relevant fields, irrespective of their membership of one of the above-named industry bodies.

Private wealth services

3 How are private wealth services commonly provided in your jurisdiction?

In Switzerland, private wealth services are provided on a heterogeneous basis with the use of different business models. Large universal banks and wealth management banking institutions (private banks) coexist with other players such as independent asset managers, family offices and trustees. Independent asset managers represent the lion's share of the para-banking sector within the Swiss financial industry, with, until 1 January 2020, a limited level of regulatory supervision other than for AML compliance purposes.

The entry into force of the new FinIA and FinSA had an important impact on wealth managers who had to review and adapt, as the case may be, their business model.

Definition of private banking

4 | What is the definition of private banking or similar business in your jurisdiction?

As a matter of principle, private banking and wealth management activities cover the provision of investment advice, the management of client assets and investment research in relation thereof, as well as custody and securities dealing services. Since the entry into force of the FinSA and the FinIA, those activities are all regulated and/or subject to conduct requirements under FinSA in Switzerland.

Licensing requirements

5 | What are the main licensing requirements for a private bank?

As mentioned above, banks (providing private banking services) are subject to licensing requirements and FINMA's ongoing supervision. Under Swiss law, banks are defined as business entities that solicit or take deposits from the public (or refinance themselves with substantial amounts from other unrelated banks) to provide financing to a large number of persons or entities. To the extent that a firm offers custody services (deposit taking), which are not limited to being used for securities transactions, it is required to be licensed as a bank.

In a nutshell, the conditions for the granting of a licence to conduct banking activities encompass financial and organisational requirements, as well as 'fit and proper' tests imposed on managers and qualified shareholders. To this end, the applicant must establish that these persons enjoy a good reputation and thereby ensure the proper conduct of business operations (ie, the guarantee of irreproachable activity).

The granting of a banking licence is further subject to a minimum equity requirement. The fully paid-up share capital of a Swiss bank must amount to a minimum of 10 million Swiss francs and must not be directly or indirectly financed by the bank, offset against claims of the bank or secured by assets of the bank. For the rest, the Swiss regulatory banks' capital and liquidity regimes reflect the Basel III recommendations with, arguably, a certain level of 'Swiss finish', with some of the requirements going beyond Based III.

Further, applicants are to appoint a recognised auditor specifically for the authorisation procedure. They are also to appoint an external audit company supervised by the Federal Audit Oversight Authority for the purpose of their ongoing supervision. The role of such a company is to assist FINMA in its supervisory functions. In this context, FINMA requires that financial and regulatory audits be conducted separately, and, where appropriate, that these two different audits be carried out by different audit firms.

Finally, it is worth noting that banks that are directly or indirectly owned or controlled by foreign nationals are subject to additional licensing requirements.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

After the delivery of the banking licence, FINMA monitors compliance with licensing criteria and the applicable regulatory obligations on an ongoing basis. If, at a later stage, any of the licence requirements cease to be fulfilled or in the case of breach of regulatory obligations, FINMA may take administrative measures and, as a last resort, withdraw the banking licence. Any changes to the organisational documents or any other conditions of the licence need to be notified to FINMA in advance and an application lodged seeking approval thereof, prior to the changes becoming effective.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

The most common form of organisation of private banks is a Swiss corporation, with some notable former private bankers having restructured from a partnership into a corporation in the past years. The Association of Swiss Private Banks counts eight members, which are all Swiss banks that are privately owned and not listed entities. However, out of the eight, four banks, which also form the Swiss Private Bankers' Association, remain organised as private partnerships, with the partners having unlimited personal liability. By contrast, banks providing wealth management services as part of their broader activities (based on the model of 'universal bank') always take the form of Swiss corporations.

Foreign banks having a presence in Switzerland are required to become authorised as a branch or representative office, depending on the scope and the intensity of the activities performed on Swiss soil, as well as certain tax and operational considerations.

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

The process to obtain a banking licence, as a matter of principle, takes about six to nine months from the date the application is filed with the Swiss Financial Market Supervisory Authority (FINMA). The duration may, however, vary in the presence of certain specific factors, such as the complexity of the structure or the involvement of foreign supervisory authorities in the event that the applicant has connections with foreign countries.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

According to article 37 Swiss Financial Market Supervisory Authority Act (FINMASA), FINMA must revoke the licence granted to a bank in the event that the latter no longer fulfils the licensing requirements or has seriously violated applicable regulatory provisions. FINMA may take this measure only in the event that it appears that the legal situation cannot be restored by means of a less restrictive measure, in accordance with the principle of proportionality. The withdrawal of a licence is not a criminal sanction, but an administrative measure whose purpose is to protect the bank's creditors. It is worth noting that the consequences of a withdrawal of a licence are the same whether the entity exercised its banking activities with or without a licence.

The withdrawal of the licence is ordered on the basis of a decision of the regulator, which triggers the winding-up of the bank. In this context, the governing bodies of the bank are no longer entitled to represent the bank, and a liquidator, supervised by FINMA, is appointed for the purpose of the liquidation procedure. For the rest, the bank is liquidated in accordance with the specific provisions of the Banking Act and the Swiss Debt Collection and Bankruptcy Act.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Since the entry into force of the Financial Institutions Act (FinIA) and the Financial Services Act (FinSA) on 1 January 2020, wealth management

activities conducted on a professional basis are subject to licensing and supervision under the FinIA, provided that they include signature authority over clients' assets and are considered as financial services under the FinSA (including pure advisory activities). Subject to applicable grandfathering rules, wealth managers have to apply for and obtain an authorisation from FINMA and comply with rules of conduct and organisational measures. Under the new regime, foreign wealth managers with a permanent presence in Switzerland are subject to licensing as a branch or representative office.

The FinIA and its implementing ordinance (FinIO) provide for a limited number of exemptions. One of them provides that wealth managers that exclusively manage assets of persons with whom they have 'economic' or 'family' ties do not fall within the ambit of the FinIA and do not need to obtain a licence to perform their activities, subject to certain requirements.

Requirements

11 | What are the main licensing requirements for wealth management?

Under the FinIA, in addition to the 'fit and proper' tests imposed on managers and qualified shareholders, the main licensing requirements (which are to be complied with at any time) for wealth managers are the following:

- the registered office and administration of the wealth manager must be in Switzerland;
- the management is composed of at the least two people having appropriate qualifications;
- a fully paid-up minimum share capital of 100,000 Swiss francs;
- a minimum equity equivalent to one-quarter of the fixed annual costs according to the latest financial statements, up to 10 million Swiss francs;
- the implementation of appropriate internal organisation, in particular as regards risk management and internal control mechanisms; and
- the conclusion of a professional indemnity insurance or the provision of sufficient financial guarantees.

According to the FinIA grandfathering rules, wealth managers that were already active prior to 1 January 2020 had to notify FINMA of their intention to apply for a licence prior to the end of June 2020 and have to submit a complete application file to FINMA (ie, after vetting of the application file by the selected SO) prior to 31 December 2022.

12 | What are the main ongoing conditions of a wealth management licence?

A wealth manager must comply with the licensing conditions set out above on a continuous basis, in particular in terms of guarantee of irreproachable activity, respectively appropriate organisational structure, minimum equity and conduct requirements. In addition, under the FinSA, wealth managers are further required, similarly to other financial service providers, inter alia, to be affiliated with a mediation body (ombudsman) recognised by the Swiss Federal Department of Finance (FDF) – unless they only provide services to institutional and per se professional clients – and ensure that the individuals providing financial services (the 'client advisers') have the technical knowledge and follow appropriate training.

As of 25 May 2022, nine mediation bodies had been recognised by the FDF.

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 | What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

The anti-money laundering and financial crime requirements imposed upon financial intermediaries within private banking are essentially know-your-customer rules and procedures, as well as certain organisational requirements (eg, internal controls, documentation and ongoing education).

In addition, a financial intermediary has a reporting duty to the regulatory body in the event that he or she is aware , or has reasonable suspicion, of the criminal origin of the assets involved (eg, the assets are connected to a predicate offence of money laundering, a criminal organisation or terrorism financing activities). In the event of reporting, the financial intermediary is to monitor the clients' assets for a period of up to 20 days (during which the regulatory body is to review the reporting made). If the case is transferred to a criminal prosecution authority following the reporting, the financial intermediary is to implement a full freeze on the account for up to five days until a decision to maintain the freeze is made by the criminal authority. An immediate freezing of assets is, however, required for assets connected to persons whose details were transmitted to the financial intermediary by the Swiss Financial Market Supervisory Authority (FINMA), the Federal Gaming Board or a self-regulatory organisation (SRO) due to a suspicion of the involvement or the support of terrorist activities.

Politically exposed persons

14 | What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

According to the Anti-money Laundering Act (AMLA), foreign and national PEPs are defined as persons who are or have been entrusted with leading public functions in politics, the administration, the military and the judicial authorities on a national level abroad, respectively, in Switzerland, as well as members of the board of directors or of the management of state-owned enterprises with national importance. Under Swiss law, this definition also covers persons who are or have been entrusted with a leading function in intergovernmental organisations or international sport associations.

Business relationships with foreign PEPs and their family members or close associates (ie, individuals who are related to them or closely connected socially or professionally) are deemed to be de facto high-risk relationships and involve increased due diligence duties. By contrast, relationships with domestic PEPs or those exposed in international organisations, as well as their family members or close associates, are deemed to present high risks only when combined with one or more further risk criteria (eg, the residence or nationality of the contracting party or the beneficial owner, the complexity of the structure, the amount of the assets, etc).

The increased due diligence duties in this context presuppose that the financial intermediary performs, in a proportionate manner, further clarifications on the contracting party, the beneficial owner and the assets involved. He or she is further to implement an effective monitoring system of these relationships and to ensure the detection of high risks in this respect.

Documentation requirements

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

Under the Anti-money Laundering Act (AMLA), financial intermediaries such as banks and asset managers are subject to various know-your-customer duties, which are in line with international standards.

In particular, they are required to verify, prior to entering into any business relationship, the identity of their contractual counterparties with a copy of a passport, identity card, driving licence or other similar documents. They further must record the first and last names, date of birth, nationality and address of their clients in their files. Further specific requirements apply to relationships established by correspondence or the internet. In this respect, since 1 January 2016, the Swiss legal framework provides for the possibility for financial intermediaries to on-board clients exclusively online. In this context, FINMA published a circular on video and online identification (FINMA Circular 2016/7), which was last modified on 6 May 2021 (with entry into force on 1 June 2021). One of the main purposes of this circular is to clarify and facilitate video and online client identification for financial intermediaries subject to KYC duties. The revised circular takes into account the technological developments since its first publication (driven in particular by the covid-19 pandemic). The most recent changes authorise, inter alia, the use of chip-embedded data contained in biometric identity documents for online client identification purposes and the use of geolocalisation methods for the verification of the client's domicile.

Financial intermediaries are also to identify the beneficial owner of the assets involved (ie, the person who has a financial interest in such assets), as well as the persons controlling legal entities conducting business activities. Under certain circumstances (eg, the contracting party is different from the beneficial owner of the assets), financial intermediaries are to obtain a written declaration signed by the contracting party in this respect. They usually document the identity of the beneficial owner (including his or her nationality, address and date of birth) with a specific form (eg, the Form A developed by the Swiss Bankers Association (SBA)).

Further, financial intermediaries are to clarify the economic background and purpose of a transaction or business relationship if: (1) it appears unusual, unless its legality is clear; or (2) there are indications that suggest the assets may be the proceeds of a crime or a qualified tax offence or are related to a criminal organisation. Enhanced due diligence obligations apply with regard to higher-risk business relationships or transactions.

In practice, in the presence of an independent asset manager, banks usually delegate their KYC duties to said manager and rely on his or her indications for anti-money laundering purposes.

On 1 June 2018, the Federal Council opened up a consultation procedure on the revision of the AMLA. The purpose of this revision was to reflect the outcome of the latest FATF review of the Swiss AML framework. In a nutshell, the main changes focus, inter alia, on the verification of the information provided on identity of the beneficial owner against reliable sources and on the requirement to periodically review the KYC information provided by clients. Further, the final draft provides for the removal of the 20-day period during which the regulatory body is to review the reporting made by the financial intermediary and revert, as the case may be. This last point aims to allow the regulatory body to prioritise the filings and treat them in a more efficient manner. The draft of the revised AMLA is now final and these changes are expected to enter into force during the last quarter of 2022, along with the revised provisions of its implementing ordinances (issued by the Swiss Federal Council and by FINMA).

Tax offence

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Under Swiss law, qualified tax offences in relation to direct taxes constitute predicate offences for money laundering within the meaning of article 305-bis of the Swiss Criminal Code (SCC).

Qualified tax offences are defined as tax fraud, provided that the evaded tax amount in any given tax year exceeds 300,000 Swiss francs. The qualified tax fraud presupposes in this context the use of false, falsified or untrue official documents (such as financial statements or salary certificates). Qualified tax offences committed abroad may also be considered as predicate offences for the purposes of article 305bis SCC, provided that these are also treated as an offence in that foreign country, and the evaded tax amount reaches the equivalent above threshold in Swiss francs.

Compliance verification

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

For a number of years, the Swiss Federal Council has been keen to implement its 'clean money strategy' through, inter alia, the introduction of enhanced due diligence requirements applicable to financial intermediaries in connection with the tax compliance of their clients. Such initiative has been subject to intense discussions and debates for years. For the time being, no specific prescriptive requirements as regards the review of the tax compliance of the clients' assets have been implemented in the Swiss legal framework.

That being said, with the revision of the Anti-Money Laundering Act (AMLA), a risk-based approach is now generally applied by financial intermediaries to assess the tax compliance of clients' assets. In addition, the participation of Switzerland in the automatic exchange of information within the Organisation for Economic Co-operation and Development since 2018 alleviated to a certain degree the risks related to tax compliance. As of today, tax information about clients with residence in countries having entered into an agreement with Switzerland for this purpose are automatically transmitted to the foreign tax authority through the Swiss tax authorities. According to the Automatic Exchange of Information Act, which entered into force on 1 January 2017, financial institutions are subject to a duty to obtain from their clients opening accounts after this date a specific self-certification indicating their name, address, tax residence, tax identification number and date of birth.

Liability

18 What is the liability for failing to comply with money laundering or financial crime rules?

Financial intermediaries may face criminal liability for failing to comply with their duty of diligence. According to article 305-ter (1) SCC, they may be sentenced to imprisonment of up to a year and to a fine (capped at 540,000 Swiss francs). In addition, in the event that they do not comply with their reporting duty to the regulatory body, they may be subject to a fine of up to 500,000 Swiss francs under the AMLA. Finally, financial intermediaries may be subject to further fines and disciplinary measures imposed by their SROs or, for banks, the Supervisory Commission of the SBA, in case of violation of their anti-money laundering self-regulatory rules.

Clients, as well as banks' and wealth managers' employees, committing money laundering offences may be subject to criminal

sanctions, including imprisonment for up to five years and a fine of up to 1.5 million Swiss francs in serious cases.

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 | Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Since 1 January 2020, the Financial Services Act (FinSA) introduced client segmentation – much like MiFID 2 – with three main segments (ie, private clients, professional clients and institutional clients). It is worth noting that the concept of qualified investors under the Collective Investment Schemes Act (CISA) has not been abolished and remains relevant in the context of assessing whether a specific collective investment scheme can be offered to a particular client. Under the new regime, high net worth individuals are considered as professional clients if they have (1) a net wealth of 2 million Swiss francs or (2) financial assets exceeding 500,000 Swiss francs and have sufficient knowledge about risks of investing in financial instruments as a result of their education or professional experience and, in each case, (3) declared that they want to be treated as professional clients (so-called 'opting out').

The provision of financial services, as well the offer of financial products, have been adapted to the protection needs of the respective client segment under the new legal and regulatory framework.

Client categorisation

20 | What are the consequences of client categorisation?

Under FinSA, the client categorisation determines, among others, the rules of conduct that the financial service providers are to apply in relation to each category of clients. Those rules of conduct include:

- an up-front obligation of information;
- an obligation to verify whether a financial instrument or service is appropriate and suitable;
- a documentation obligation and accountability requirement; and
- transparency and due diligence requirements for the execution of client orders.

Financial services providers have to perform an assessment of appropriateness when advising clients on individual transactions in the context of advisory or discretionary asset management services. By contrast, an assessment of suitability is required when providing investment advice on their entire portfolio or in the case of discretionary asset management services.

In this context, no specific rules apply with respect to institutional clients (eg, financial intermediaries subject to the Banking Act (BA), the Financial Institutions Act of 2020 (FinIA) or the Collective Investment Schemes Act (CISA), foreign clients subject to prudential supervision, insurance companies). Likewise, professional clients (eg, pension funds, large companies, high-net worth individuals having opted out) have the possibility to waive certain protections as regards information and documentation reporting. Furthermore, the FinSA provides that the financial service providers may rely on the assumption that professional clients have the necessary knowledge and experience and may assume economically the risks associated with the proposed services.

The FinSA also provides for an opting-in and out system across the different client categories. As an example, high net worth individuals and private structures created for them (without professional treasury operations) have the possibility to opt out to be considered as professional clients (instead of private clients). The opting in and out declarations are to be made in writing.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

Generally, Swiss regulatory law does not provide for a specific consumer protection legal framework for financial services. That being said, within the provision of certain types of credit facilities, Swiss financial institutions are to observe a series of mandatory consumer protection rules that cannot be varied to the detriment of consumers.

Within national and international 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 as regards the determination of the competent jurisdiction or the applicable law.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

There are no foreign exchange controls applicable in Switzerland.

By contrast, certain restrictions on movements on funds are imposed by the Federal Council Ordinances implementing international (eg, United Nations) or Swiss domestic sanctions targeted against certain countries or specific individuals or entities and often mirroring EU and/or US sanctions regimes. In 2022, the Swiss sanctions – in lockstep with the US and EU sanctions – have been significantly expanded in relation to the situation in Ukraine and, in addition to the classic sanctions restrictions, have introduced new wide-ranging restrictions across a broad range of sectors, from financial services to industrial and luxury goods exports and related services.

It is worth mentioning that, in May 2022, the Federal Council has issued a preliminary draft legislation for consultation seeking to introduce foreign investment controls in Switzerland. This follows an international trend towards stricter regulation of foreign investments. The consultation period will last until 9 September 2022. Based on this, the Federal Council will prepare the draft legislation and probably submit it to Parliament next year. The law is not expected to enter into force before 2024.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

In principle, there are no restrictions on (cash) withdrawals imposed by Swiss law or regulation. On the contrary, the only legal means of discharging a debt in Swiss francs is by way of legal tender (cash); any other settlement methods (wire, cheque, etc) are purely contractual. In practice, most banking institutions have in recent years included in their general terms and conditions restrictions on cash withdrawals, as well as certain other types of non-transparent transactions that otherwise would expose the banking institution to increased risks.

Indeed, in accordance with the Anti-Money Laundering (AML) regulations, in the event that a financial intermediary has made a report to the regulatory body, it is to ensure the paper trail of transactions involving substantial amounts, and therefore may be required to impose restrictions on (cash) withdrawals. Likewise, in the event that a financial intermediary terminates a suspicious relationship without having made any report (because of an absence of reasonable grounds to suspect money laundering or terrorism financing), he or she may authorise

(cash) withdrawals of substantial amounts only if the paper trail is ensured. Banks are, however, free to impose further restrictions in their internal policies, based on their own assessment of the risks associated with such transactions, within the limits of the banking contractual relationship with the client.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

No specific restrictions apply, subject to compliance with AML regulations. In particular, specific regulatory requirements apply to transactions with cryptocurrencies, including the implementation of the 'travel rule'.

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

Banks incorporated in Switzerland, as well as Swiss branches and representative offices of foreign banks, are bound by a statutory duty of confidentiality towards their clients (ie, banking secrecy). The disclosure of client information to third parties, including parent and affiliated companies, is prohibited in this context.

Banking secrecy is, however, not absolute and may be waived or does not apply under certain exceptional circumstances. In recent years, the importance and scope of Swiss banking secrecy has been subject to intense discussion following pressure from foreign countries. The situation has, however, changed as regards tax matters with the implementation of the automatic exchange of information.

Since the entry into force of the Financial Institutions Act on 1 January 2020, wealth managers newly subject to supervision are to comply with a statutory duty of confidentiality (similar to banking secrecy; see above) towards their clients.

In addition to the above, clients' data is also protected by the provisions of the Data Protection Act (DPA), which is generally in line with European legislation on data protection. Of note, the DPA and its implementing ordinances are currently under revision in order – at least in theory – to harmonise it with the data protection standards adopted by the EU (ie, the EU General Data Protection Regulation 2016/679 (GDPR) and EU Directive 2016/680). The revised DPA was adopted by the Swiss Parliament on 25 September 2020. At the time of writing, the implementing ordinances are still in the process of being revised. It is worth noting that this reform will allow Switzerland to uphold its status as a country providing for an equivalent level of data protection and to be recognised as such by EU member states. The Swiss Federal Council currently anticipates an entry into force of the revised DPA and its implementing ordinances in September 2023.

Scope

26 | What information and documents are within the scope of confidentiality?

Swiss banking (and professional) secrecy encompasses all information and documents that pertain to the contractual relationship between the bank (respectively the wealth manager) and its clients. That said, Swiss case law and scholars make it clear that purely internal notes and instructions of a bank (ie, not specifically relating to a client or containing client-identifying information) pertain to the bank's own private sphere and are not covered by banking secrecy.

Likewise, the contractual confidentiality provisions within asset management agreements usually cover a similar scope of information.

For the purposes of data protection, the term 'personal data' comprises any information that relates to an identified or identifiable person (ie, the data subject), it being understood that Swiss law adopts a 'relative' approach to the identification, in the sense that the ability to identify a data subject from the data is assessed relative to the person processing the data, by reference to legal means to access other data that may be correlated to the dataset under review, and not merely based on the theoretical ability of any person to reverse engineer a dataset.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

Swiss banking (and professional) secrecy does not apply in certain exceptional situations. This is the case when a bank (or a regulated wealth manager) is under a disclosure of information duty to Swiss public or judicial authorities, in accordance with relevant Swiss procedural regulations. Further, communication of information for the purposes of consolidated supervision over a banking group to which a Swiss bank belongs (provided that such communication is necessary and fulfils further conditions) may be allowed despite banking secrecy. Finally, banks and other institutions subject to the FinIA are authorised to disclose client-related data provided the client has given his or her consent. To be valid, the secrecy waiver is to be expressly given in writing and the client is to be specifically informed on the consequences of such a waiver. Further, its scope is to be clearly defined.

In terms of data protection, the exceptions and limitations in relation to the processing or communication of personal data generally rely on the data subject's consent, a legal obligation or a prevailing public or private interest. Certain limitations also apply in the event of a transmission of data abroad, namely in the event that the foreign country to which the data is transmitted does not offer an adequate level of data protection.

Breach

28 | What is the liability for breach of confidentiality?

Under Swiss law, a breach of banking or professional secrecy is considered as a breach of the relationship with the client, and may give rise to criminal and civil liability.

The potential sanction for an intentional breach of banking and professional secrecy is a fine of up to 540,000 Swiss francs or a jail sentence of up to three years for the individuals involved. In cases where a pecuniary advantage was obtained for the individual involved or a third party through the breach, the potential jail sentence is up to five years or a fine. In the case of negligence, the sanction is a fine of up to 250,000 Swiss francs. Further, an intentional breach may be considered as an activity contrary to proper banking practice (article 3, paragraph 2(c) Banking Act). In practice, the Swiss bank and its management would run a risk of sanctions and may ultimately lead to the withdrawal of the Swiss banking licence, as well as personal bans from exercising any managerial roles in regulated entities for the individuals. The same considerations would apply in our view to wealth managers newly subject to supervision.

Finally, the Swiss bank or wealth manager would also incur a civil liability based on breach of contract towards its clients for any financial prejudice suffered by them as a result of the disclosure information. The extent of liability for breach of contract will depend on the terms of the contractual agreement, in particular any indemnification or limitation of liability provisions.

For the rest, the potential sanctions in the case of intentional breach of certain provisions of the current DPA is a fine capped at 10,000 Swiss francs. The revision of the DPA, however, provides for a revised cap at 250,000 Swiss francs.

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

The regime for cross-border banking and wealth management activities is quite liberal in Switzerland. Foreign banks that operate on a strict cross-border basis (ie, by offering their services to Swiss clients without having a permanent presence in Switzerland) are not subject to any licensing requirements with the Swiss Financial Market Supervisory Authority (FINMA). If, however, their activities involve a physical presence in Switzerland on a permanent basis (ie, the existence of a permanent establishment in the form of a Swiss branch or Swiss representative office), this cross-border exemption is not available. In practice, FINMA considers a foreign bank to have a Swiss presence as soon as employees are hired in Switzerland. That being said, the regulator may also look at further criteria to determine whether a foreign bank has a Swiss presence.

Since 1 January 2020, the same principle as above applies to foreign independent wealth managers. The FinIA requires that foreign entities providing wealth management activities with a permanent presence in Switzerland request and obtain from FINMA a Swiss branch or representative office licence.

For the rest, the provision of wealth management services or any other financial services on a cross-border basis triggers the need to comply with the Financial Services Act of 2020 (FinSA) (and the Collective Investment Schemes Act, in the case of marketing of collective investment schemes), subject to limited exemptions for financial services provided on a reverse solicitation basis, for example.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

In the event that a foreign bank (ie, an entity that (1) benefits from a licence to conduct banking activities in its home jurisdiction, (2) uses the terms 'bank' or 'banker' in its corporate name, purpose or documentation, or (3) conducts banking activities) meets the presence test in Switzerland, it is to request, prior to exercising its activities, a licence with FINMA for the establishment of a branch or a representative office.

Among different licensing requirements, the principle of reciprocity is to be satisfied in the country in which the foreign bank has its registered office. This presupposes that a Swiss bank is entitled to establish a representative branch, office or agency in the relevant foreign country without being subject to substantially more restrictive provisions than those applicable in Switzerland.

The licensing requirements for Swiss branches or representative offices of foreign wealth managers may also include the principle of reciprocity to be satisfied, provided that FINMA requires so.

Finally, in the case of a provision of financial services on a cross-border basis, the FinSA is to be complied with. In this context, client advisers (ie, individuals who actually provide financial services within a given institution or on their own) are to be registered with a specific register. This obligation also extends to client advisers of foreign financial services providers, unless a statutory exception applies. In this respect, the FinSO exempts client advisers of foreign financial institutions subject to prudential supervision in their home jurisdiction from the duty to register, provided that those target only institutional investors and/or per se professional investors (the latter excludes opted-out HNWI and private investment structures established for HNWI, which are not covered by this exemption according to the current interpretation expressed by the client advisers registers).

As of 25 May 2022, three registration bodies have been recognised by FINMA to manage the client advisers' register, namely BX Swiss AG, the Association Romande des Intermediaires Financiersand PolyReg Services GmbH.

Regulation

31 | What forms of cross-border services are regulated and how?

With the entry in force of the FinIA and FinSA on 1 January 2020, foreign financial services providers acting on a cross-border basis in Switzerland or providing services to clients in Switzerland are now subject to certain rules of conduct, are to implement organisational measures and have to register client advisers in a public client advisers' registry, subject to certain exceptions provided in the FinSA.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Employees of foreign private banking institutions or foreign wealth managers may travel to meet clients and prospective clients in Switzerland, provided this does not create a permanent presence in Switzerland and no activity of distribution of collective investment schemes is performed. In this context, certain non-regulatory restrictions, such immigration law considerations, may apply.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

No licensing or registration requirements apply as a matter of principle for the sending of documents to Swiss-resident clients, provided these do not constitute an offer or advertisement for collective investment schemes or other financial products, or the offer or provision of financial services (in which case, the FinSA provisions are to be complied with). However, pursuant to the Unfair Competition Act, commercial information sent to clients must not violate their privacy, nor use abusive, misleading or unfair methods.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 | What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

Swiss tax residents are to disclose to tax authorities, for the purpose of income and wealth taxes, private banking accounts both in Switzerland and abroad. The disclosure of Swiss banking accounts owned by foreign taxpayers depends on the applicable foreign tax law.

A Swiss withholding tax applies on Swiss source income (interest and dividends) payable on private banking accounts regardless of the residence of the taxpayer. Subject to certain conditions, foreign taxpayers may qualify for a partial or total exemption of such tax in application of a double tax treaty between Switzerland and their country of residence.

Reporting requirements

35 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Specific requirements apply to Swiss banks for US taxpayers in application of the Agreement between Switzerland and the United States for Cooperation to Facilitate the Implementation of the Foreign Account Tax Compliance Act (FATCA) and its implementing Act and Ordinance. Under this regime, banks are to report account details directly to the US tax authorities, provided the consent of the US taxpayer concerned is given (FATCA Model 2). In the absence of such consent, financial institutions are allowed to disclose data only through administrative assistance channels. On 8 October 2014, the Federal Council adopted a specific mandate to discuss with the US a changeover to Model 1 (ie, automatic exchange of information through the Swiss tax authorities). At present, it is still unknown when the new agreement introducing a Model 1 IGA arrangement will be implemented with the United States. Since 20 September 2019, group requests within the FATCA framework and with respect to facts having taken place from 30 June 2014, are now allowed under the protocol modifying the double taxation treaty between Switzerland and the United States. In this context, the Internal Revenue Service may request information on reported accounts with Swiss financial institutions in an aggregated form.

With the implementation of the automatic exchange of information, Swiss banks have become subject to new obligations imposed by the legal framework that relies on the Common Reporting Standard elaborated by the Organisation for Economic Co-operation and Development, as transposed into Swiss law or in an international agreement. They are to collect and exchange foreign clients' information (ie, taxpayers' name, address, date and place of birth, account number, taxpayers' identification number and account balance or value, and information on income and the beneficial owners) with Swiss tax authorities, who in turn transmit the information to the tax authorities of the country of residence of the taxpayers, which have an agreement in place with Switzerland in this respect. To date, Switzerland has implemented the automatic exchange of information with about 100 partner states and territories, including all member states of the EU.

Finally, for the time being, no reporting or disclosure duty exists in relation to Swiss taxpayer clients of Swiss financial institutions.

Client consent on reporting

36 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

Under Swiss law, customer data obtained within a banking relationship (or a wealth management relationship with a regulated wealth manager) is subject to banking, respectively, professional secrecy, which prohibits, in principle, the disclosure of such data to third parties. As a result, with respect to FATCA, for instance, the US taxpayer's consent is required for the disclosure of information in accordance with the FATCA regime. Under Swiss law, the consent given in this context may be revoked at any time, with only limited caveats under the FATCA implementing legislation (ie, revocation only effective for the subsequent financial reporting year). The consequence of such a revocation is that the banking institution (or the wealth manager) is no longer allowed to disclose customer data. No retroactive effect may apply in this context, unless otherwise agreed by both parties.

With the introduction of the automatic exchange of information, the scope of the Swiss banking secrecy has been further reduced in tax-related matters (tax transparency principle prevailing), insofar as customer consent is no longer required for this purpose given that the disclosure of data to the Swiss tax authorities is provided for by law.

STRUCTURES

Asset-holding structures

37 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

In general, Swiss-resident clients hold individual accounts with Swiss banks. In certain cases, Swiss residents may hold their assets through a holding company in the form of a Swiss corporation. That being said, there is no particular benefit to do so under Swiss law, with the exception of certain investments, such as in the private equity sector, to benefit from some tax deferrals through such structuring.

By contrast, foreign clients usually hold their assets either through individual accounts or structure accounts. The latter comprises accounts owned by: (1) offshore private investment companies with or without an overlying foreign trust or foundation; (2) trustees (in the case of a trust); or (3) foundations. The risks associated with the holding of assets in this manner depend on the applicable foreign tax law. The costs depend on the providers offering administration services in relation to these structures.

Know-your-customer

38 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

In the event that the contracting party is a domiciliary company (this term includes foundations, (trustees of) trusts, fiduciary companies or similar associations that do not exercise any business activities), financial intermediaries are to identify their beneficial owners or beneficiaries. In this case, the contracting party is to confirm in writing the name, date of birth, nationality and domicile of the beneficial owner or beneficiary. As regards trusts, financial intermediaries are further to: (1) collect the same information on the settlor (effective and not fiduciary); (2) record the characteristics of the trust (eg, revocable, discretionary etc); and (3) identify the trustee and the protector of the trust. Likewise, in the event that the contracting party is a foundation, the financial intermediary is to collect the above information not only as regards the beneficiary but also in relation to the founder (effective and not fiduciary).

Following the latest Financial Action Task Force (FATF) mutual evaluation report on Switzerland, the Financial Market Supervisory Authority (FINMA) decided to further revise the FINMA AML Ordinance to eliminate certain shortcomings identified in Swiss legislation and the revised text entered into force on 1 January 2020. The revision has notably strengthened financial intermediaries due diligence duties in relation to domiciliary companies or complex structures and reduced the threshold for identification measures for cash transactions to the FATF level of 15,000 Swiss francs.

Controlling person

39 What is the definition of controlling person in your jurisdiction?

Swiss financial intermediaries are to establish the identity of the beneficial owners of operating companies and partnerships (ie, controlling person). Under the Anti-Money Laundering Act (AMLA), a controlling person is defined – in accordance with the FATF standards and recommendations – as the individual holding 25 per cent of the share capital

or voting rights or controlling the company in any other manner. In the event that no beneficial owner can be identified, the identity of the most senior member of management of the entity is to be recorded for this purpose. In this context, the contracting party of the financial intermediary is to confirm in writing the name and the address of the controlling person.

Structures listed on a stock exchange, as well as entities owned by such structures, are not subject to such identification requirements.

With respect to trusts, foundations and similar arrangements, the concept of controlling person tracks the FATF Recommendations and includes the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions.

Obstacles

40 | Are there any regulatory or tax obstacles to the use of structures to hold private assets?

There are no regulatory obstacles to the use of structures to hold private assets. From an anti-money laundering perspective, the use of an offshore structure is a high-risk indicia, unless there is a clear business rationale for the recourse to such a structure.

The potential tax obstacles to this use depend on the tax legislation of the country of residence of the taxpayers, as well as of the structures. For Swiss individual taxpayers, depending on the type of private assets involved (eg, securities portfolio), the use of a holding company would typically not make sense from a pure tax perspective, given that private capital gains are not taxable in Switzerland, whereas dividends from a structure would be. However, there may be other objectives for using a structure that outweigh any tax considerations, including liability limitation (eg, venture capital investments), holding organisation and reinvestment planning, estate planning, asset protection and the like.

CONTRACT PROVISIONS

Types of contract

41 | Describe the various types of private banking and wealth management contracts and their main features.

Private banking and wealth management contracts may take different forms, depending on the activities performed by the bank or the independent asset manager.

Asset management contracts are usually defined as mandate agreements where the client grants the bank or the independent asset manager a power of attorney to manage his or her assets on a discretionary or non-discretionary basis. Such contracts, when concluded with a bank or another entity subject to supervision, are to comply with certain regulatory and self-regulatory requirements .

Independent asset managers or banks may also render purely advisory services on the basis of advisory mandate agreements (which are considered as financial services under the Financial Services Act (FinSA)). In this context, the client is advised in his or her own investment decisions or benefits from recommendations in relation thereto. This type of agreement is not subject to specific regulatory provisions (except those contained in the FinSA) and essentially obeys to the general provisions of the Swiss Code of Obligations (SCO) applicable to mandate agreements.

In the absence of an asset management or advisory agreement, financial intermediaries usually have an execution-only relationship with their clients. Their activities are thus limited to the execution of clients' instructions.

In practice, Swiss banks and asset managers provide in their contractual documentation that the relationship is governed by Swiss law. In an international context, such a choice of law is valid under the Swiss Private International Law Act (PILA), provided that the contract is not characterised as a consumer contract (ie, a contract pertaining to goods or services of ordinary consumption intended for personal or family use that is not connected with the consumer's professional or business activity). Should this be the case, the contract must be governed by the law of the state of the consumer's habitual residence if:

- the financial intermediary has received the request as regards the conclusion of the contract in that state;
- the contract was entered into after an offer or advertising in that state and the consumer undertook the necessary steps for the conclusion of the contract in that state; or
- the consumer was solicited to go to a foreign state to conclude the contract.

Only private banking and wealth management contracts related to services of ordinary consumption may be considered as consumer contracts, which considerably limits the scope of application of the above principle. According to certain Swiss scholars, private banking and wealth management contracts do not fall within this definition.

Liability standard

42 | What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

Under Swiss law, whoever causes damage, either intentionally or by negligence, may occur civil liability based on both tort or breach of contract. The claimant is to prove the existence of:

- an unlawful act, respectively, a breach of contract;
- a prejudice;
- a causal link between the unlawful act, respectively, the breach of contract and the prejudice; and
- a fault of the defendant.

In the case of breach of contract, the fault of the other party is presumed and must be rebutted by the latter.

Notwithstanding the above, parties may contractually limit their civil liability within the limits set forth in article 100 SCO. Under this article, an agreement according to which liability for unlawful intent or gross negligence would be excluded is null and void. In addition, a waiver of liability for simple negligence may be considered to be null and void at the discretion of the judge if, inter alia, the liability arises out of the conduct of a business that is carried on under an official licence (eg, a banking licence according to Swiss case law; which should apply in our view to wealth managers newly subject to supervision). By contrast, a bank (or a regulated wealth manager in our view) may exclude its liability in the case of simple negligence committed by its representatives or agents. As a result, banks usually provide in their general terms and conditions that they may be held personally liable only in the event of wilful misconduct or gross negligence.

Mandatory legal provisions

43 | Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

From a contractual law perspective, the SCO provides for a right for either party to a mandate agreement to terminate the contractual

relationship at any time with immediate effect. Such a provision is of mandatory nature and may not be contractually varied.

On the topic of the retrocessions paid by third parties within asset management activities (ie, inducements), pursuant to Swiss case law, private banks and asset managers are entitled to retain retrocessions and other distribution fees they receive in connection with their mandate only on the basis of a comprehensive waiver based on an informed consent of the client. In all other circumstances, the client is entitled to such retrocessions and fees. Those principles were implemented in the new FinSA, according to which the disclosure requirement further applies irrespective of any mandate relationship (ie, including in case of 'execution only' transactions). As a result, receiving retrocessions is allowed as long as the recipient specifically discloses those retrocessions, obtains the client's consent and provides detailed information upon the client's request.

For the rest, banks are subject to the Portfolio Management Guidelines issued by the Swiss Bankers Association and recognised by the Swiss Financial Market Supervisory Authority as the minimum standard in accordance with Circular 01/2009. In a nutshell, both Guidelines:

- provide that asset management agreements are to be in writing (including any equivalent electronic form);
- impose on asset managers certain duties of care, loyalty and information in relation to their clients, as well as a duty to comply with a fit and proper test; and
- require that the agreements specify the terms of the remuneration of the service provider. In practice, the Guidelines enacted by SROs for independent asset managers contain similar provisions.

Limitation period

44 What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The applicable limitation period for claims depends on the type of civil liability the bank or the independent asset manager may face.

As a rule, the general limitation period for the initiation of proceedings in contractual matters is 10 years. That being said, claims for interests are time-barred after five years. As far as asset management agreements are concerned, it worth noting that the Swiss Supreme Court has clarified that the statute of limitations applicable to claims based on the restitution of inducements is 10 years after the receipt by the service provider of the inducements in question.

With respect to tort or unlawful enrichment, the statute of limitations is one year from the date on which the concerned person gained knowledge of the damage or, respectively, of its right to ask for restitution, but, in any event, 10 years from the day when the harmful act took place.

Under Swiss law, the limitation period may be varied provided that, inter alia, a potential reduction of the period does not unfairly jeopardise the rights of the creditor. Further, subject to certain exceptions, one may waive in advance the applicable limitation period.

The running of the statute of limitations is interrupted by debt enforcement proceedings, an application for conciliation, the commencement of a court action or raising an objection before a court or arbitral tribunal, or a petition for bankruptcy. Where a claim is interrupted, a new limitation period starts to run. By contrast, the limitation period does not start running and, if it has begun, is suspended, inter alia, for as long as the claim cannot be brought before a Swiss court.

DISPUTES

Competent authorities

45 What are the local competent authorities for dispute resolution in the private banking industry?

Civil courts are usually competent for dispute resolution in the private banking industry. The general terms and conditions of banks, as well as asset management agreements concluded with wealth managers, provide, in principle, that the civil courts of the canton where these are located are competent to review the matter. However, consumers within the meaning of the Swiss Code of Civil Procedure, the Private International Law Act, or the Lugano Convention may bring their action before the canton or the country of their residence.

The procedure in Switzerland is governed by the Civil Code of Procedure and usually starts with a request for a conciliation hearing with the competent civil court. That being said, in the event, inter alia, the value in dispute exceeds 100,000 Swiss francs, the parties can jointly waive the conciliation proceedings and submit their dispute directly to the competent civil court.

The action before the court is initiated with the filing of a written statement of claim. Upon receipt of the advance on the judicial costs, the court notifies the statement of claim to the defendant. The latter then has to file a statement of defence in turn. Depending on the complexity of the matter and other criteria, hearings or other rounds of written briefs take place. In this context, the parties submit their evidence or request for evidence (eg, witness hearing). After this phase, the court renders its judgment, which is subject to appeal.

In Switzerland, clients of Swiss banks may also lodge a complaint with the Swiss Banking Ombudsman, which is supported by the Swiss Banking Ombudsman Foundation, established by the Swiss Bankers Association. The Swiss Banking Ombudsman acts as a mediator with the aim to settle conflicts and avoid legal proceedings between banks and their clients. Ombudsman services are free of charge for banks' clients. Concurrently, the Ombudsman is responsible for the Central Claims Office in relation to dormant assets.

Notwithstanding the above, under the new Financial Services Act of 2020, financial service providers are to be affiliated to a mediation body (subject to exemptions). As a matter of principle, disputes with their clients are to be referred to this body for a mediation procedure (which does not preclude the parties from initiating civil proceedings). As of 25 May 2022, nine mediation bodies have been recognized by the Federal Department of Finance. Financial services providers, such as wealth managers both acting in Switzerland and on a cross-border basis, must have registered with a mediation body at the latest on commencing their activity, subject to exemptions.

Disclosure

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

Private banking disputes are usually disclosed in the audit reports drafted by the regulatory auditors of banks to the Financial Market Supervisory Authority (FINMA)'s attention. In addition, banks and licensed wealth managers are to report immediately to FINMA, respectively the supervisory organisation, any incident of substantial interest, as well as any changes affecting the ongoing licensing requirements or having an impact on the fit and proper test (ie, guarantee of irreproachable activity).

Separately, a client may file a complaint with FINMA, which has full discretion as to whether to initiate a formal investigation for the purposes of its regulatory supervision. In this context, the complaining

client will not be party to any administrative action that FINMA may take and such client will not have any right to be informed or take part in the proceedings (administrative enforcement case).

UPDATE AND TRENDS

Recent developments

47 Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

On 1 January 2019, a new type of licence, the 'fintech licence', was introduced into the Swiss regulatory framework for companies accepting public deposits but not using those deposits to finance a traditional banking activity (ie, lending to business). Where this is the case, the aggregate amount of public deposits is limited to 100 million Swiss francs and may neither be invested nor interest-bearing. This new fintech licence involves less stringent regulatory requirements than a full banking licence, and leaner minimal capital requirements apply. In December 2018, the Swiss Financial Market Supervisory Authority (FINMA) issued its guidelines for fintech licence applications, which highlight the information and documents that an applicant must submit when applying for such authorisation.

In the past couple of years, FINMA has further been focusing on new forms of capital raising by start-ups in the form of initial coin offerings (ICOs), token-generating events and token sales. Due to the increase of companies using such business models, FINMA published on 16 February 2018 its guidelines for enquiries regarding the regulatory framework for initial coin offerings. The Guidelines are intended to provide more transparency regarding FINMA's practice on this topic but also to allow it to streamline enquiries as regards possible or existing ICO launches. On 11 September 2019, FINMA published a supplement to its ICO guidelines outlining the treatment of 'stable coins'. As a matter of fact, the requirements under supervisory law differ depending on which assets (eg, currencies, commodities, real estate or securities) the 'stable coin' is backed by and the legal rights of its holders.

On 25 September 2020, the Swiss Parliament adopted certain amendments to the existing Swiss legislation aiming at recognising a new type of dematerialised securities, based on distributed ledger technology or similar technologies, and at adapting the financial infrastructure laws to be compatible with such new financial instruments (so-called DLT Act). This DLT Act provides for the recognition of the tokenisation of assets such as shares, bonds and other financial instruments and will allow issuers to raise capital through tokenized debt or equity issuances. Further, it improves the legal certainty of the treatment of crypto-based assets in an insolvency context by providing that such assets be segregated in the event of a bankruptcy or an insolvency of intermediaries or custodians holding such assets, provided certain minimal requirements are complied with. On 1 February 2021, the parts of the DLT Act aiming at introducing the concept of DLT-based securities into Swiss law (through a revision of the Swiss Code of Obligations, the Federal Intermediated Securities Act and the Federal Act on International Private Law) entered into force. The remaining amendments affecting the financial infrastructure laws (eg, the new authorisation relating to a DLT trading facility, as well as improvements of client protection in case of bankruptcy as regards crypto-assets) entered into force on 1 August 2021.

Finally, it is worth noting that FINMA enacted in May 2020 its Communication 05/2020 on the obligation to notify cyber-attacks. In this communication, the regulator specifies the notification duties imposed on financial intermediaries subject to its supervision with the introduction of short-term deadlines to report cyber-attacks events (as part of their duty to report significant events). This specific communication has been triggered by the 2020 pandemic crisis, which increased the number cyber-attacks in the financial sector.

The Swiss banking regulatory framework is expected to remain in a state of flux for the years to come with changes aiming at equally strengthening client protection and promoting innovation in the financial sector. The year 2023 is also expected to lead to developments in the field of sustainable finance. On 24 June 2020, the Federal Council adopted a report and guidelines on sustainability in the financial sector aiming at strengthening Switzerland's position as a leading location for sustainable finance. In this context, the Federal Council issued in November 2021 a statement recommending, inter alia, that all financial market players use comparable and meaningful climate compatibility indicators to help create transparency in all financial products and client portfolios and avoid greenwashing practices. For the rest, the necessity to adopt binding requirements (in particular transparency obligations) is currently being assessed. Legislative proposals (if any) are expected to be presented at the end of 2022. The Swiss financial market regulator (FINMA) has, however, already issued in November 2021 guidelines (Guidance 05/2021) addressing greenwashing in the advisory process and at the point of sale. Certain self-regulatory organisations have also published guidelines and positions papers relating to sustainable finance and greenwashing (such as the Swiss Bankers Association and the Asset Management Association Switzerland). We thus anticipate that the coming years will see further developments in this regard, notably under the impulse of the European Union.

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United Kingdom

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PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 | What are the main sources of law and regulation relevant for private banking?

The main source of law relevant to private banking in the UK is the Financial Services and Markets Act 2000 (FSMA). This sets out when private banking services would be regulated activities for UK purposes, thereby requiring a licence from the UK Financial Conduct Authority (FCA) or the UK Prudential Regulation Authority (PRA). It is a criminal offence, punishable by fine or imprisonment, for a person to carry out a regulated activity without authorisation (this is known as the general prohibition under FSMA).

FSMA (Regulated Activities) Order 2001 is a statutory instrument that sets out further information on regulated activities, specified investments and relevant exemptions for UK law purposes.

UK private banks typically carry out a range of regulated activities falling within the scope of the above legislation, including: (1) accepting deposits; (2) arranging (bringing about) deals in investments; (3) advising on investments; (4) dealing in investments as principal; and (5) managing investments.

The FCA and the PRA each have their own respective rules, contained within the FCA Handbook and PRA Rulebook that pertain to the way in which private banks deliver their services to clients and carry out their obligations to the regulators.

There is also a vast range of primary and secondary EU legislation, such as the Markets in Financial Instruments Regulation and Market Abuse Regulation, which private banks must also comply with.

Regulatory bodies

2 | What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

In the UK, there are two regulatory bodies, the FCA and the PRA.

The PRA is part of the Bank of England and is responsible for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major or 'systemically important' investment firms. This includes deposit taking private banks.

The FCA is the conduct regulator for all financial services firms and the prudential supervisor for firms not also regulated by the PRA. Firms regulated by both the PRA and FCA are known as dual-regulated.

Private wealth services

3 | How are private wealth services commonly provided in your jurisdiction?

Private wealth services are offered through a range of private banks, wealth management firms, asset managers and independent financial advisers (IFAs). The UK has also seen the emergence of online robo adviser platforms that may be operated by the existing banks or new fintech platforms entering the market. Family offices are also common and a family office will also be a client of a private bank in some cases, to gain access to a broader range of investment opportunities.

Definition of private banking

4 | What is the definition of private banking or similar business in your jurisdiction?

There is no specific definition of 'private banking' or 'wealth management', either in the FCA Handbook or PRA Rulebook. A private bank is defined (in short) in the FCA Handbook as 'a bank or building society or operationally distinct brand of a firm, over half of whose personal current account customers each had throughout the previous financial year net assets with a total value of not less than £250,000. Private banking and wealth management are very similar concepts, and overlap in some respects. Generally, whereas wealth management can be practiced on a portfolio of any size and is a broader category. The FCA uses the term 'wealth management' when a customer has signed an agreement with a firm to have their money or investments managed on a discretionary or advisory basis.

Licensing requirements

5 | What are the main licensing requirements for a private bank?

The PRA and FCA also have a joint initiative called the New Bank Start-Up Unit to provide information and support to applicants that are considering becoming a new bank in the UK.

Private banks offering a service of accepting deposits must apply to the PRA for authorisation.

An application pack is available on the PRA website and a requisite fee must also be paid. An applicant is required to provide the following information (this list is not exhaustive):

- core details;
- regulatory business plan (including details of their proposed business model and intended investment strategies);
- financial resources (which must demonstrate the minimum regulatory capital);
- human resources including senior management functions and governance framework;
- compliance and internal audit policies; and
- infrastructure (such as IT).

The applicant must also identify its controllers. The regulators will also usually have a pre-application meeting before the application for authorisation is submitted.

Under the UK's Senior Manager and Certification Regime, firms must demonstrate that those individuals that they wish to undertake

senior management functions (such as chief executive, chair, MLRO, compliance oversight) are fit and proper. They will also have to certify that certain other individuals (those who are not senior managers) are also fit and proper.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

There are ongoing requirements that an authorised firm must adhere to. UK regulated firms must continue to meet the threshold conditions on and ongoing basis, comply with all relevant law and regulation, pay the necessary fees and levies and submit the relevant regulatory returns.

For private banks, the PRA threshold conditions relate to:

- legal status (the firm must be a body corporate or partnership);
- location of offices (a firm's head office and mind and management must be in the UK if incorporated in the UK);
- to be conducted in a prudent manner (ie, to have appropriate financial and non-financial resources);
- suitability (the emphasis being on the suitability of the firm); and
- effective supervision.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

Typically, a private bank will be structured as a private company limited by shares or a public limited company. A foreign private bank wishing to operate in the UK may structure themselves as a branch or a subsidiary. However, firms considering a branch model should assess whether the branch will attract supervision from both the home country of the private bank in addition to the UK.

The PRA has issued a Supervisory Statement for International banks wanting to access the UK via a branch and its approach to subsidiary supervision (SS5/21) to ensure that the international bank is meeting the PRA's threshold conditions. It expands on the PRA's approach to banking supervision by covering those firms operating in the UK as a subsidiary or through a branch, and it replaces the previous Supervisory Statement (SS1/18). A more proportionate approach is set out as the PRA recognises that firms (including those operating with deemed authorisations under the temporary permissions regime) may need additional time to adjust. It sets out the PRA's expectations for meeting the threshold conditions on the prudent conduct of business, including systems and controls and risk management.

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

Firms should allow 12 to 18 months to obtain a Part 4A permission in the UK. Typically, it takes around four months to prepare a full application. The regulators have a 12-month statutory deadline to reach a decision, following receipt of an application.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

An authorised firm can apply to the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) (as appropriate) for cancellation of their Part 4A permission.

Firms must submit a detailed plan setting out how they intend to cease their operations. PRA-regulated firms may also be subject to express directions from the PRA on specific actions that must be taken before the application for cancellation of permissions is submitted. No fees are charged by the PRA for cancelling permissions.

Cancellation applications should include:

- a concise explanation of how the Board has satisfied itself that the authorised firm is no longer carrying on regulated activities;
- an audited financial report to demonstrate that there are no outstanding liabilities arising from its regulated activities;
- evidence of any assessment of the validity and implications of arrangements entered into where it has undertaken to transfer or cancel contractual obligations in relation to its regulated activities; and
- any supporting documentation.

The PRA takes a risk-based approach to determining a cancellation application. It will make a decision on complete applications within six months, but where it assesses an application on receipt as being incomplete, the PRA have six months to make its decision.

When considering a cancellation application, consideration will be given to factors such as whether the authorised firm has:

- ceased to hold client money or to hold or control custody assets;
- repaid all client deposits;
- unresolved, unsatisfied or undischarged customer complaints;
- any ongoing regulatory investigations; and
- any unsettled debts to the regulator or unsettled or unexpired liabilities to consumers.

The PRA has up to 12 months to determine an application.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Yes. Wealth management firms usually undertake the regulated activities of managing investments, advising on investments, dealing in investments and safeguarding and administering investments, and therefore they will have to be authorised and hold the relevant regulatory permissions, so are thereby subject to both supervision and licensing.

Note that family offices can sometimes benefit from an exemption from the need to be licensed. This exemption allows a firm to, for example, manage investments without requiring authorisation where it manages assets that belong to a group member (this is known as the group exemption).

Requirements

11 | What are the main licensing requirements for wealth management?

Wealth managers are usually solo-regulated and therefore apply to the FCA for authorisation.

An application pack is available on the FCA website and a requisite fee must also be paid. An applicant is required to provide the following information (this list is not exhaustive):

- core details;
- regulatory business plan (including details of its proposed business model and intended investment strategies);
- financial resources (which must demonstrate the minimum regulatory capital);
- human resources, including senior management functions and governance framework;
- compliance and internal audit policies; and
- infrastructure (such as IT).

The applicant must also identify its controllers. The regulators will also usually have a pre-application meeting before the application for authorisation is submitted.

Under the UK's Senior Manager and Certification Regime, firms must demonstrate that those individuals that they wish to undertake senior management functions (such as chief executive, chair, money laundering reporting officer, compliance oversight) are fit and proper. They will also have to certify that certain other individuals (those who are not senior managers) are also fit and proper.

Occasionally, wealth managers wishing to access the UK can become 'appointed representatives' of existing UK authorised firms, whereby the UK firm remains responsible for the UK regulatory compliance of the overseas wealth manager who in turn can act under the regulatory permissions of the UK firm.

12 | What are the main ongoing conditions of a wealth management licence?

They are as for other authorised firms, including a private bank. That is, there are ongoing requirements which an authorised firm must adhere to including continuing to meet the threshold conditions on and ongoing basis, comply with all relevant law and regulation, pay the necessary fees and levies and submit the relevant regulatory returns.

For wealth managers, the FCA's threshold conditions are:

- location of offices (an authorised firm's head office and mind and management must be in the UK if incorporated in the UK);
- effective supervision (an authorised firm must be capable of being effectively supervised by the FCA);
- appropriate resources (both financial and non-financial resources);
- suitability (the emphasis being on the suitability of the authorised firm itself); and
- business model (whether the authorised firm's strategy for doing business is suitable for its regulated activities).

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 | What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

Private banks and wealth managers are required to establish and maintain effective policies, procedures, systems and controls that enable them to identify, assess, monitor and manage the risk that they will be used to finance terrorism or launder the proceeds of crime. Private banks and wealth managers must, therefore, ensure that these controls enable them to comply with the UK's Anti-money Laundering (AML) and counter-terrorist financing (CTF) regulatory framework that, broadly, comprises two parts:

- the criminal offences of money laundering and terrorist financing: which are applicable to all individuals and entities in the UK, not just those in the regulated sector. The primary offences are set out in the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000 (TACT); and
- the AML and CTF systems and controls, governance and conduct of business obligations required of in-scope firms: which are set out in the UK's implementation of the pan-European Fourth and Fifth Money Laundering Directives, by way of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) (the MLRs 2017).

To comply with the MLRs 2017, private banks and wealth managers must:

- perform a written risk assessment of the money laundering (ML) and terrorist financing (TF) risks to which its business is subject and provide it to the relevant regulator on demand;
- use that risk assessment to design group-wide AML and CTF policies and procedures and internal controls;
- ·perform client due diligence (CDD) (or know your customer), using a risk-based approach, primarily at on-boarding (but also at certain other points in the business relationship);
- identify clients who are politically exposed persons or established in a high-risk third country or are otherwise high risk and apply enhanced client due diligence (EDD);
- perform ongoing monitoring of all business relationships, using a risk-based approach;
- identify and verify the client's ultimate beneficial owner (where relevant);
- where the client is a legal person, understand the ownership and control structure of that legal person;
- provide training on the UK AML and CTF regulatory framework to staff;
- comply with record keeping requirements; and
- allocate to a senior manager (who may also be the money laundering reporting officer or MLRO) overall responsibility for the establishment and maintenance of effective AML and CTF controls.

Sector specific guidance for wealth managers published by the Joint Money Laundering Steering Group (JMLSG) is helpful in directing all firms subject to the MLRs 2017 in how to comply with the MLRs 2017 (JMLSG Guidance).

Politically exposed persons

14 | What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

Private banks and wealth managers are required to apply EDD to PEPs and to 'family members' and 'known close associates' of PEPs. EDD includes performing standard CDD and taking the following additional measures: (1) requiring senior management sign off to establish the relationship; (2) understanding source of wealth and source of funds; and (3) conducting enhanced ongoing monitoring of the business relationship and the client's transactions. The JMLSG Guidance fleshes out how firms should apply EDD in different scenarios.

A PEP is defined in Regulation 35(12) of the MLRs 2017 as an individual entrusted with a prominent public function, other than as a middle-ranking or more junior official. This includes, for example, heads of state or government, members of Parliament, members of supreme courts, directors of international organisations, members of governing bodies of political parties, members of courts of auditors or of the boards of central banks, ambassadors and high-ranking officers in the armed forces and executive members of state-owned enterprises. MLD5 amended the MLRs 2017 to require member states to issue, and keep up to date, a list that more precisely indicates the exact functions that qualify as 'prominent public functions' in that member state, to aid firms in identifying PEPs. The UK's list is set out in the FCA's Finalised Guidance (FG17/6) on how firms identify PEPs.

A 'family member' of a PEP includes a spouse or a civil partner of a PEP, children of the PEP and the spouse or civil partner of a PEP's children and the parents of a PEP. A 'known close associate' is any person who is either: (1) known to have joint beneficial ownership of a legal entity or arrangement or any other close business relations with a PEP; or (2) an individual who has sole beneficial ownership of a legal entity or arrangement that is known to have been set up for the benefit of a PEP. When determining whether a person is a known close associate

of a PEP, private banks and wealth managers need only have regard to information that is in their possession or to credible information that is publicly available.

Documentation requirements

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

Regulation 28 of the MLRs 2017 sets out, at a high level, the measures private banks and wealth managers should take when performing standard CDD on clients. The information obtained for account opening purposes should enable the firm to: (1) identify the client; (2) verify the client's identity (ie, evidence that they are who they say they are); and (3) assess the purpose and intended nature of the business relationship or transaction in question.

The JMLSG Guidance adds helpful detail for what CDD information firms should obtain for different client types. When opening an account for an individual, a private bank or wealth manager should ascertain the client's full name, date of birth and residential address and obtain documentary (eg, copies of passports, driving licence, etc) or electronic (eg, electoral roll entries, credit ratings, etc) evidence to verify this information. If the individual is established in a high risk third country, is a PEP or is otherwise assessed as high risk, the private bank or wealth manager should apply EDD and gather additional evidence (see above).

Tax offence

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Yes. POCA sets out the criminal regime and sanctions for money laundering, the majority of which turn on the handling, concealment, transfer, acquisition, use, being involved in an arrangement concerning, possession or association with 'criminal property'. The definition of 'criminal property' is very broad. Property is criminal property if it constitutes any benefit from 'criminal conduct' (which would include tax offences), or it represents such a benefit (in whole or in part, whether directly or indirectly). Criminal property includes money, goods and chattels with a value. In short, any criminal conduct that results in a measurable financial benefit is a predicate offence for money laundering purposes. There is no de minimis level.

Compliance verification

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

Firms must verify which of their client accounts are held for individuals who are tax-resident in certain other jurisdictions with which the United Kingdom has entered into an agreement to collect tax information from clients and share it with Her Majesty's Revenue & Customs (HMRC) (in accordance with theInternational Tax Compliance Regulations 2015/878).

Liability

18 What is the liability for failing to comply with money laundering or financial crime rules?

Part 7 of POCA sets out both the primary money laundering offences and offences resulting from a failure to act on knowledge or suspicion of money laundering. There are three primary money laundering offences in POCA relating to the direct handling of 'criminal property'. These offences can be committed by any person, not just those in scope of the MLRs 2017.

The primary money laundering offences are very wide. It is an offence to:

- conceal, disguise, convert, or transfer criminal property, or to remove criminal property from the jurisdiction of England and Wales;
- enter into, or become concerned in an arrangement, that is known or suspected to facilitate (by whatever means) the acquisition, retention, use, or control of criminal property by or on behalf of another person; or
- acquire, use, or possess criminal property.

The maximum criminal sanction for any of the above offences is imprisonment for up to 14 years, a fine or both.

There are also two further key offences that only apply to firms in the 'regulated sector'. These are:

- Failing to disclose knowledge or suspicion of money laundering. The maximum criminal sanction for either of the failure to disclose offences is imprisonment for up to five years, a fine or both.
- Tipping off. It is an offence for a person to tell another person that a disclosure has been made to a nominated officer (typically the MLRO) or the law enforcement agencies, where this is likely to prejudice an investigation or proposed investigation into money laundering. The maximum criminal sanction for the failure to disclose offence is imprisonment for up to two years, a fine or both.

There is also the offence of prejudicing an investigation under POCA. The maximum criminal sanction for the prejudicing an investigation offence is imprisonment for up to five years, a fine or both. Financial services regulators could also fine a regulated firm or its senior managers for a failing in relation to their financial crime obligations.

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Yes. The United Kingdom categorises clients into three categories: retail, professional and eligible counterparty clients. Private banks are required to categorise all clients appropriately and notify the client of their categorisation in writing.

A retail client is defined as any client type that does not qualify as a professional or an eligible counterparty client.

Professional clients are generally other regulated types of financial institutions or institutional investors or large corporates satisfying two of the following size criteria on a company basis: (1) balance sheet total of €20 million; (2) net turnover of €40 million; (3) own funds of €2 million. There are equivalent size criteria for partnerships, trusts and public bodies.

It is also possible for retail clients to opt up to professional status in the context of certain transactions. To do this, the private bank needs to make a qualitative assessment of the client's knowledge and experience such that it is capable of making its own investment decisions and understanding the risks involved. The client must also satisfy at least two of the following criteria: (1) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters; (2) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds €500,000; (3) the client works or has

worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

Most individual private bank clients, including HNWIs and sophisticated clients, will be categorised as retail clients. However, those individuals may be opted up to professional client status to trade certain types of instruments with the private bank. In some circumstances, clients are on boarded to the private bank via a family trust, which is able to meet the professional client category on an ongoing basis.

Client categorisation

20 | What are the consequences of client categorisation?

The UK regulatory regime contains certain rules which have the goal of protecting investors. The investor protection regime is generally considered to offer more significant protection in the context of retail clients when compared with professional clients and eligible counterparties. In a private bank context, this results in the following practical impacts:

- Enhanced disclosures are required in client terms of business and marketing materials.
- All client communications must be drafted in easy to understand plain English.
- Website communications and the 'customer journey' using the web platforms of private banks are subject to regulation.
- A private bank is required to assess and analyse additional information in the context of advising retail clients when compared with professional clients. In particular, a private bank is permitted to assume the client has the necessary level of knowledge and experience and an ability to bear losses in the context of professional clients. Whereas such factors must be assessed in the context of retail clients.
- Retail clients have the right to complain to the Financial Ombudsman Service in respect of the regulated activities of a private bank, whereas, professional clients do not.
- Similarly, a retail client's monies and investments are often protected under the Financial Services Compensation Scheme in the event of an insolvency of a private bank.
- The UK has rules prohibiting the marketing of certain high-risk products to retail clients in the UK. Such rules apply to contingent convertibles, contracts for difference (including binary options), speculative mini bonds and unregulated collective investment schemes. However, exemptions apply for sophisticated retail clients.
- The UK has rules restricting the payment of commissions by product providers to advisers of UK retail clients.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

Yes. The UK Consumer Rights Act 2015 (CRA 2015), which governs, in particular, the fairness of contractual terms that UK private banks and wealth managers enter into with their clients. It applies to both standard contracts and individually negotiated arrangements with the client. In addition to this, the legislation applies to oral statements, financial promotions, website information and other client notices and communications.

A contract term whereby a contract concluded with a consumer is to be governed by the law of the country in which the non-UK private bank is established is unfair if it does not unambiguously specify that consumers can still rely on the mandatory consumer protection rules of the country of their usual residence.

The fairness of contractual terms with retail clients has been a key focus area of the FCA in recent years and is, therefore, an area where private banks and wealth managers exercise increased caution.

During 2021 and 2022, the FCA has been consulting on the introduction of a new Consumer Duty (Consultation Paper CP21/36) that aims to set a higher standard of consumer protection in retail financial markets. These proposals relate to products and services sold to retail clients (not professional clients or eligible counterparties). Firms would need to ensure that their products and services are fit for purpose and offer fair value, and that their communications and customer service enable consumers to make and act on well-informed decisions. The new consumer duty would be compatible with, but not replace the communications-related provisions in other existing consumer protection legislation such as the CRA 2015. For example, drafting and regularly reviewing product and service contract terms to ensure fairness under the CRA 2015 is likely to be consistent with the Consumer Duty. The final policy statement and new rules are expected by 31 July 2022.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

None. The UK does not restrict the movement of currencies between countries. However, UK private banks and wealth managers must be mindful of any dealings with countries that are subject to sanctions. On 22 February 2022, the UK government announced sanctions on Russia, and measures were also taken against Belarus on 24 March 2022. All firms need to screen against the UK Sanctions List to meet these new sanctions measures, and are legally obliged to report known or suspected breaches to the Office of Financial Sanctions Implementation (OFSI) at the earliest opportunity. In addition, they must notify the FCA. Before undertaking an activity prohibited by the sanctions regulations, any firm (including UK private banks or wealth managers) would need to apply in advance and obtain a licence from the relevant government department before proceeding.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

There are no restrictions imposed by English law or financial services regulation on cash withdrawals in any currency. However, some banks embed policies around withdrawal amounts that customers may be subject to under contract. Such policies assist the banks in managing the risk of fraudulent withdrawals or other financial crime exposures.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

No. There are no restrictions imposed by English law or financial services regulation on cheque withdrawals or the withdrawal of bullion, securities or cryptocurrencies from an account.

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

There is no specific statutory regime on banking secrecy in the UK. However, there is a non-statutory or common-law duty of confidentiality, arising from the contractual relationship between a bank (including a

private bank) and its customers. Under English common law, a bank owes a duty of confidentiality to its customer, and it is an implied term of the contract between the bank and its customer that the bank will keep the customer's information confidential. However, firms customarily include express (as opposed to implied) confidentiality obligations in the terms of business and other contractual agreements between the customer and the private bank, that are entered into at the start of the relationship and prior to the provision of any services.

Scope

26 | What information and documents are within the scope of confidentiality?

The implied duty of confidentiality duty is subject to a number of exceptions, but otherwise it extends to all information that the bank has about its customer, which is likely to include personal and financial information. Under *Tournier v National Provincial and Union Bank of England* (1924), the basic duty of confidence was expressly stated to cover:

- the state of the account (credit or debit balance);
- the amount of the balance;
- all the transactions that go through the account; and
- the securities (if any) given in respect of the account.

This applies both for the duration of the account being open, but also beyond the period when the account is closed or ceases to be an active account. The obligation also extends to information obtained from sources other than the customer's actual account, if the time at which the information was obtained arose out of the banking relationship between the bank and its customer.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

There are some established exceptions or limitations to the English common law duty of confidentiality. The case of *Tournier v National Provincial and Union Bank of England* (1924) established that a bank may divulge information about its customer in the following circumstances:

- where the bank has the customer's (express or implied) consent to disclose the information;
- where the bank is compelled by law (court orders, statute or regulation) to disclose the information;
- where the bank has a public duty to disclose the information; or
- where disclosure of the information is required to protect the bank's own interests.

However, while the principles in *Tournier* are generally accepted, they should also be considered in the context of other legal principles that govern confidential information specifically such as the General Data Protection Regulation Regulation (GDPR). (The UK onshored the EU's GDPR and ensured that during the transition period the UK-GDPR did not diverge from the EU's. The UK-GDPR continues most of the requirements, but tailored for the UK. At the end of the transition period (ie, 31 December 2020), the UK-GDPR and EU-GDPR are essentially the same, but potentially may differ over time. In certain situations involving an EU element, both these data protection regulatory regimes may apply). Furthermore, if there are express contractual obligations that permit the disclosure of the customer's information in certain circumstances, then the obligations under *Tournier* will not apply in those circumstances.

There are also certain statutory exemptions that exist that would allow a bank to disclose confidential information in particular circumstances. For example:

- the Financial Conduct Authority (FCA) has statutory powers to require the provision of information to it in certain circumstances; HMRC has wide investigatory powers if it suspects non-compliance with statutory provisions in respect of tax; and
- AML and counter-terrorist financing (CTF) legislation can require banks to disclose information where there are reasonable grounds to suspect that a customer is involved in AML or CTF offences.

If, for example, the FCA required the disclosure of such information to its investigators as part of an ongoing investigation, it will not itself make an onward disclosure of the confidential information without legal authority (and there are certain circumstances in which the FCA may do so.)

A duty of confidentiality will also not apply to information that is already in the public domain or is common knowledge because that information is, by definition, public and not confidential.

Breach

28 | What is the liability for breach of confidentiality?

A private bank can be the subject of an injunction or a legal claim for breach of contract or breach of common law. If a customer considers that there is either about to be a breach, or there has been a breach, of the duty of confidentiality then they can: (1) apply to the court for a temporary or permanent injunction to refrain or restrain disclosure or a repetition of a previous disclosure; and (2) seek damages for a breach of contract, assuming there are express confidentiality obligations, or for a breach of the common law duty of confidentiality.

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

For a non-UK private bank or wealth manager to be deemed to be carrying out their regulated activities cross border into the United Kingdom, it must be deemed to be performing a regulated activity (eg, advising on investments, dealing in investments on behalf of clients or portfolio management), in relation to a regulated investment (eg, transferable securities such as shares, bonds) from a place of business (or establishment) in the United Kingdom.

Private banks located outside the UK that are seeking to market services or a potential investment to a UK-based client can only do so within the scope of the Financial Services and Markets Act 2000 (Financial Promotions) Order 2005. This permits marketing to clients satisfying the definition of 'high net worth individual' or 'sophisticated investor' as long as certain required disclosures are contained within the communications and signed statements received from the UK-based clients confirming their status.

The UK regime limits the marketing of certain products to UK-based retail clients (subject to certain exemptions for sophisticated investors and high net worth clients). For example, speculative mini-bonds, unregulated collective investment schemes, contracts for difference, binary options, contingent convertibles.

Since the end of the transition period, firms authorised as credit institutions or MiFID investment firms in another member state of the European Economic Area can no longer provide services to and market to clients based in the UK under a 'passport'. The UK left the EU without a deal granting equivalent status to UK financial services. However, as part of the UK's preparations for Brexit, the UK introduced temporary permissions and recognition regimes (referred to as TPR and TRR respectively) to ensure firms can continue their business with minimal disruption. Inbound firms meeting the TPR's or TRR's requirements

can continue to operate in the UK within the scope of their previous permissions for a limited period only, while seeking full UK authorisation from the UK regulators (FCA, PRA and BoE). Under these regimes, various obligations apply and regulatory actions will be taken where a firm decides it does not want to apply for authorisation, or where its application is refused or withdrawn.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

The UK has a specific exclusion for overseas persons meaning that a private bank providing services cross- border to clients located in the UK that otherwise has no establishment in the UK will not be subject to UK licensing requirements.

The above position assumes that the UK is not a core part of the overseas private bank's business operations. If a firm wants to actively target UK-based clients for private banking services or certain investments, a regulator may take the view that it should set up a place of business in the UK and become formally licensed to offer those services. The UK is currently considering how its current overseas framework, including the overseas person exclusion (among other provisions), supports the UK's position as a global financial centre. It wants to ensure that UK legislation achieves this goal and published a call for evidence in 2021, followed by responses received and next steps for this review. The government intends to seek further information before publishing proposals on potential changes to the UK's regime for overseas firms and activities, and hopes to make it more coherent and easier to navigate. A consultation paper on potential changes to the UK's regime for overseas firms is expected later in 2022.

Separate rules apply where a non-UK branch of a UK private bank seeks to provide services cross-border to UK-based clients.

Regulation

31 | What forms of cross-border services are regulated and how?

Sending marketing communications cross-border to the UK is prohibited unless those communications are sent by a UK-authorised firm or otherwise subject to an exemption. The Financial Services and Markets Act 2000 (Financial Promotions) Order 2005 permits marketing to clients satisfying the definition of 'high net worth individual' or 'sophisticated investor' as long as certain required disclosures are contained within the communications and statements of sophistication or net worth are obtained from the relevant clients and refreshed annually.

Separate rules apply where a non-UK branch of a UK private bank seeks to provide services cross-border to UK based clients. In these circumstances, the non-UK branch will be subject to the UK regulatory regime when servicing UK-based clients.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Yes. It is possible for employees of foreign private banks to travel to meet their clients in person in the UK. However, it is important to ensure that such activity is not deemed to be sufficiently frequent so as to give any representation that the activity is taking place from by way of business in the UK, thereby triggering a threshold condition for authorisation. Further, it must at all times be clear to the UK client that the services are being provided by an overseas private bank an,d therefore, not subject to UK regulation. Accordingly, it is prudent to limit the number of days a relevant employee is located in the UK.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Sending marketing communications cross-border to the UK is prohibited unless those communications are sent by a UK-authorised firm or otherwise subject to an exemption. Marketing for these purposes is defined as a 'financial promotion', which is an invitation or inducement to engage in investment activity and captures all forms of media.

The Financial Services and Markets Act 2000 (Financial Promotions) Order 2005 permits marketing to clients satisfying the definition of 'high net worth individual' or 'sophisticated investor' as long as certain required disclosures are contained within the communications and statements obtained from the relevant individuals confirming their sophisticated or high net worth status. Such statements would need to be refreshed annually.

Due to the above restrictions, it is not advisable nor commonplace to target UK-based prospective retail clients with large-scale marketing efforts, but it is possible to service a handful of known clients cross-border on this basis.

Further, it is important to note that the exemptions available to cross-border marketing arrangements depend on the types of securities being marketed. For example, the exemption available to high net worth individuals is not available in the case of listed securities.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 | What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

Private banks in the UK disclose information on accounts held with them to her Majesty's Revenue & Customs (HMRC). An individual's UK residence and domicile that determines their UK tax liability. UK taxpayers will also generally disclose income and gains on their UK-based accounts to HMRC as part of an annual tax filing.

Reporting requirements

35 | Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Under the disclosure of tax avoidance scheme rules, HMRC must be notified in relation to certain tax avoidance arrangements that enable or might be expected to enable someone to obtain a UK tax advantage.

HMRC has powers to issue financial institution notices to request information, without the consent of taxpayers, from UK private banks necessary to confirm the tax position of clients in the scope of HMRC's remit.

For US account holders, UK private banks follow the reporting standards under the Foreign Account Tax Compliance Act.

UK private banks must comply with the Organisation for Economic Co-operation and Development's Common Reporting Standard (as implemented by the UK's International Tax Compliance Regulations 2015), disclosing to HMRC reportable information in relation to account holders from the in-scope jurisdictions. This includes: the name, address, jurisdiction of residence, date and place of birth of the account holders, account number and balance.

The UK has also implemented its version of EU Directive 2018/822 (DAC 6). Intermediaries are required to disclose cross-border arrangements with certain 'hallmarks' that the UK considers renders these arrangements higher risk.

Client consent on reporting

36 | Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

Consent is not generally required. However, clients will often be notified in advance, usually in the general terms of business, of the private bank's obligation to make the relevant disclosures and HMRC's ability to share information with other tax authorities.

STRUCTURES

Asset-holding structures

37 | What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

Tax benefits may be available to structures such as private fund limited partnerships, family limited partnerships and family investment companies (FICs).

For example, in comparison to certain family trusts, FICs may have preferential inheritance tax treatment and are subject to preferential (corporate) tax rates.

Know-your-customer

38 | What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

Regulation 28 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) (the MLRs 2017) sets out, at a high level, the measures private banks and wealth managers should take when performing standard customer due diligence (CDD) on clients. The information obtained for account opening purposes should enable the firm to: (1) identify the client; (2) verify the client's identity (ie, evidence that they are who they say they are); and (3) assess the purpose and intended nature of the business relationship or transaction in question.

The Joint Money Laundering Steering Group (JMLSG) Guidance adds helpful detail for what CDD information firms should obtain for different client types. When opening an account for a legal entity, the private bank or wealth manager must obtain and verify the name of the body corporate, its company or other registration number and the address of its registered office (and, if different, its principal place of business). It is also necessary to identify and verify the client's ultimate beneficial owner, the senior person responsible for managing it (and keep records of the steps taken to identify this person) and to understand the legal entity's ownership and control structure. The JMLSG Guidance sets out additional CDD requirements based on the nature of the legal entity (eg, public company listed on an EU-regulated market, public company listed in a third country, a regulated entity or a private limited company).

Controlling person

39 | What is the definition of controlling person in your jurisdiction?

Part 21A of the Companies Act 2006 (CA 2006) sets out the UK's 'persons with significant control' (PSC) regime and requires all UK companies (ie, all companies formed or registered under the UK's Companies Acts, with some limited exceptions) to both identify PSC (which can be individuals or 'registrable entities') and to keep a PSC Register (either as a statutory company register that must be made available on request or made publicly available via Companies House). Individuals or registrable entities who know or ought reasonably to know that they are a registerable PSC are also required to make disclosures to the company in question to facilitate and accurate and up-to-date PSC Register. Similar requirements apply in relation to unregistered companies, LLPs and eligible Scottish partnerships.

A company within scope of Part 21A of the CA 2006 must take reasonable steps to determine if there are any legal or natural persons who must be included in the PSC Register. The rules on identifying individuals (which is defined broadly) who are PSC are complex and require that individual to directly or indirectly hold shares or voting rights in the company and satisfy one or more of five 'specified conditions' that are centred on the individual holding 25 per cent or more of the shares or voting rights in the company or otherwise being able to exercise significant influence over the company (including the right to appoint or remove a majority of the company's directors). The rules on identifying registrable entities mean that such an entity will be included in the PSC Register if they are a legal entity, that would satisfy one of the 'specified conditions' if it was an individual and that is subject to its own disclosure requirements (ie, it too is required to keep a PSC Register relating to its ownership).

When performing CDD on customers, private banks and wealth managers are required to identify the customer's ultimate beneficial owner (UBO), where relevant. Where the customer is a body corporate, the UBO is, broadly, any individual who: (1) exercises ultimate control over the management of the body corporate; (2) owns or controls (directly or indirectly) more than 25 per cent of the shares or voting rights in the body corporate; or (3) controls the body corporate.

Where the customer is a trust, the beneficial owner is each of: (1) the settlor; (2) the trustees; (3) the beneficiaries; (4) where the individuals (or some of the individuals) benefiting from the trust have not been determined, the class of persons in whose main interest the trust is set up, or operates; and (5) any individual who has control over the trust. For the purposes of (5), 'control' means a power to, for example, vary or terminate the trust, dispose of, advance, etc, trust property and add or remove beneficiaries, appoint or remove trustees.

Under Regulation 30A of the MLRs 2017, where a private bank or wealth manager is establishing a business relationship with a customer and performing CDD, and that customer is required to keep a PSC Register, the private bank or wealth manager must obtain a copy of that PSC Register from the customer as part of its CDD and keep it on file. However, when a private bank or wealth manager is performing CDD and identifying and verifying the identity of the UBO, it cannot solely rely on the entity's PSC Register; it must supplement this with its own diligence in accordance with the MLRs 2017 and the JMLSG Guidance.

Private banks and wealth managers are under a duty to report any discrepancies they uncover when performing CDD between their understanding of the customer's ownership structure and what is recorded on the PSC Register.

Obstacles

40 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

Yes. Tax structures need to be carefully analysed to ensure that they do not inadvertently create structures that bring the entities in the structure within scope of regulated activities by virtue of offering certain services to other entities within the group. For example, investment management services to group entities are exempt from regulations and fund that do not raise capital from external investors (eg, multiple different families) are also exempt. Structures must be mindful of the parameters of these exemptions.

Tax structures must also be considered in line with the parameters of the Trusts Registration Service, FATCA, the UK's International Tax Compliance Regulations 2015, and the thresholds for transfer of wealth into trusts in line with the relevant thresholds for inheritance tax.

CONTRACT PROVISIONS

Types of contract

41 Describe the various types of private banking and wealth management contracts and their main features.

Typically, private banks and wealth management contracts take the form of terms and conditions that set out the services offered and the regulatory obligations of the private bank in offering those services. The services covered might include banking, advisory managed accounts, discretionary managed accounts or execution only offerings. Frequently, such terms will include additional annexes that detail further bespoke services offered to certain clients.

Generally, UK private banks and wealth management firms look to maintain the same terms with all clients because they have built their operational arrangements in line with their contractual commitments. This can make it difficult to offer negotiated terms to individual clients.

Contracts will generally be governed by the laws of England and Wales and it would be unusual for a UK firm to agree to change this.

For UK law purposes, when contracting with individual consumers, verbal commitments, statements in emails and on websites can all be construed as forming part of the contractual terms in place with the client.

Liability standard

42 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

The liability standard at law is negligence. It is generally deemed unfair to individual clients to contractually seek to exclude liability for negligence, wilful default or fraud and any attempt to do so would be disregarded by the UK courts in the context of a contractual dispute.

For this reason, UK-based private banks and wealth managers typically seek to limit their liability to losses resulting from their negligence, wilful default or fraud or other material breach of contract.

Mandatory legal provisions

43 Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

Yes. The FCA Handbook sets out certain mandatory provisions that must be contained within a client terms of business. These differ depending on whether the firm is contracting with retail or professional clients. They cover matters such as client categorisation, the services being offered, the complaints process and access to the UK Financial Ombudsman Service, a summary of conflicts of interest, an overview of how money and assets are safeguarded and the availability of compensation scheme protection.

The Consumer Rights Act 2015 also sets out certain expressly prohibited terms which apply to most private bank or wealth management terms of business with retail clients.

Many UK private banks and wealth managers now offer their services via websites and interactive platforms, there are also rules in the UK governing the customer experience in the context of the technology operation of these platforms.

In addition to the initial contract with the client, UK private banks and wealth managers are subject to ongoing disclosure obligations, most notably in relation to costs and charges and suitability reports (in the context of advisory services). New UK disclosure obligations are emerging in relation to 'sustainable finance' or environmental, social and governance (ESG). For example, the FCA plans to publish a consultation in Q2 2022 on Sustainability Disclosure Requirements (SDR), which are part of the government's Green Finance: A Roadmap to Sustainable Investing, published in October 2021. The SDR disclosures and sustainable investment labels that it proposes would apply to certain asset managers and FCA-regulated asset owners, and their investment products.

For in-scope listed companies, the FCA published its final policy on diversity and inclusion on company boards and executive committees (Policy Statement PS22/3) in April 2022, which introduces new mandatory Listing Rules requiring in-scope issuers to include a 'comply or explain' statement in their annual financial report setting out whether they have met specific board diversity targets (representation of women and people from a minority ethnic background). PS22/3 also expands the disclosure reporting requirements to cover the diversity policies of key board committees.

Limitation period

44 What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The Limitation Act 1980 sets out a six-year statutory limitation period for simple contracts and certain actions in tort. These periods run from the date on which the cause of action occurred.

Connected to this, UK private banks and wealth managers are required to retain records in relation to their services for a period of five years (although time periods differ depending on the context). Firms will often retain records for a minimum of seven years to accommodate the statutory limitation period referenced above.

DISPUTES

Competent authorities

45 What are the local competent authorities for dispute resolution in the private banking industry?

Clients of private banks and wealth management firms will be directly to complain to the firm in the first instance. If the client is not satisfied with the firm's response, the next steps depend on the categorisation of the client.

Retail clients can complain to the UK Financial Ombudsman Service that will assess the complaints and either make an award in favour of the client that the firm is bound by or dismiss the claim. The decisions of

the Financial Ombudsman service are made public and, therefore, firms will often seek to resolve complaints privately where possible. Where a claim is dismissed by the Financial Ombudsman Service, the retail client has the option of escalating the complaint to the UK courts.

Professional clients cannot access the Financial Ombudsman Service and will generally escalate complaints to the UK courts where they are dissatisfied with the firm's response.

Disclosure

46 | Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

UK private banks and wealth managers must disclose data on complaints to the regulator on an annual basis. Firms will not generally disclose details of individual complaints unless such complaints are subsequently referred to the Financial Ombudsman Service or litigated in the courts. In such circumstances, firms would consider their obligation to 'notify the regulator of anything that it would reasonably expect notice of in line with their regulatory obligation under Principle 11 of the Financial Conduct Authority (FCA) and Prudential Regulation Authority Principles for Business.

The FCA operates a 'customer contact centre' whereby clients can log complaints against a regulated firm. This could result in the FCA seeking to investigate the conduct of the firm. Retail clients are also permitted to escalate complaints to the Financial Ombudsman Service.

UPDATE AND TRENDS

Recent developments

47 | Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

The private bank industry is undergoing significant change in the UK at present.

A review of the Markets in Financial Instruments Directive is considering a new client categorisation of sophisticated retail to adapt the investor protection regime for the high net worth sophisticated clients of private banks and create a more flexible environment in which regulated firms can service those clients.

The UK Financial Conduct Authority (FCA) has recently launched a Call For Input on Open Finance. Open Finance envisages a world in which you could access your bank accounts, credit cards, mortgage, pensions, savings accounts and ISAs, brokerage account, home and car insurance, life insurance and other financial products on one user interface or app, even if each of those products are held with different providers. Open Finance would allow for apps to provide innovative financial management services across all of those products, such as automated switching to the best products, holistic investment advice and budgeting, and sweeping of excess cash into products yielding a better return than today's current accounts. The FCA is demonstrating its commitment to lead the global regulators in creating a regulatory environment for this type of private banking and wealth management services.

In the UK, we are also seeing the emergence of robo adviser platforms and the FCA has sought to clarify the difference between traditional investment advice and 'basic advice' to create a lighter touch regulatory framework for more innovative investment solutions.

In relation to the UK's new freedom to tailor its rules to better suit UK markets, the government launched a major consultation, known as the Future Regulatory Framework (FRF) or FRF Review, to consider how the financial services regulatory framework should adapt to be fit for the future, and in particular to reflect the UK's new position outside of the EU. It is expected to result in a more tailored set of rules which meets the specific needs of the UK market, while still remaining anchored by the high international standards that the UK has done so much to shape. If enacted as proposed, the FRF will change the statutory and regulatory framework for financial services. The latest FRF consultation ran from November 2021 to February 2022 and the government is expected to publish the outcome of feedback in 2022.

Climate change and ESG matters are high on the regulatory agenda in the UK. In 2021, the Chancellor of the Exchequer set out his expectation that the FCA 'have regard' to the government's commitment to a net-zero economy by 2050 in all its regulatory activities. The regulatory concern is with the risk of harm if the financial sector responds to rising consumer demand and awareness of ESG issues without a supportive regulatory foundation and adequate protections to avoid 'greenwashing' by companies and financial firms. The UK is also actively engaged internationally on these issues and committed to ensuring that the UK's future regime will be consistent with global standards.

Diversity and inclusion remains a core area of FCA focus. In addition to mandatory disclosures mentioned above on UK and overseas companies, the PRA, BoE and FCA are jointly considering policy options to improve diversity and inclusion more widely in financial services. A joint consultation plan on proposals is expected in Q2 2022, with the aim of arriving at a final policy statement in Q3 2022.

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