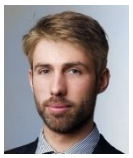
Access to the UK market: the impact of the Berne Financial Services Convention on Swiss portfolio managers

After more than two years of negotiations, Switzerland and the United Kingdom have signed on December 21, 2023 a unique bilateral mutual recognition agreement, the Berne Financial Services Convention or the Mutual Recognition Agreement ("**MRA**"). The MRA aims at facilitating mutual market access and strengthening the regulatory and supervisory cooperation between two major international financial centers. In the wealth management industry, it is expected that the MRA will evolve to a certain extent the access of Swiss portfolio managers to the UK market.



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1. What is the Berne Financial Services Convention and how does it work?

Through the MRA, Switzerland and the United Kingdom mutually recognize the equivalence of their respective regulatory and supervisory frameworks in specific areas of the financial sector. The financial industries covered by the MRA include banking, investment services, non-life insurance, asset management and financial market infrastructures for sophisticated clients. The equivalence of the Swiss and English regulatory and supervisory frameworks in the sectors governed by the MRA is based on the assessment that the regulation and supervision of the other party achieves equivalent results in terms of financial stability, market integrity as well as client and investor protection.

The cross-border supply of financial services in each sector governed by the MRA is based on one of the following three regimes. The applicable regime for the relevant service providers is determined by the degree of recognition by one party of the other party's regulatory framework for each relevant industry.

- **Supply based on deference:** Swiss and UK financial service providers may provide their services in the host jurisdiction in accordance with the regulatory and supervisory rules applicable in their home jurisdiction, subject to certain conditions which may be specified in the relevant sectoral annex to the MRA.

- **Supply based on domestic law:** Swiss and UK financial service providers may provide their services in the host jurisdiction in accordance with the domestic laws of the host jurisdiction, subject to certain conditions which may be specified in the relevant sectoral annex to the MRA. Where Switzerland or the UK proposes to amend their domestic laws in a manner which would restrict the supply, a consultation procedure is to be launched between the two states.
- **Supply based on other arrangements:** Swiss and UK financial service providers may provide their services based on other specific arrangements between the parties.

2. What will change for Swiss portfolio managers providing their cross-border services in the UK?

Swiss portfolio managers can currently conduct certain business in the UK on a cross-border basis. However, the legal framework for doing so is narrower and less certain than that provided for in the MRA.

The UK regulatory system established under the Financial Services and Markets Act 2000 ("**FSMA**") prohibits firms from carrying on regulated activities in the UK unless they are authorised or exempt. Through a combination of a general regulatory practice known as the "characteristic performance test", and a statutory exclusion from the FSMA prohibition known as the "overseas person exclusion", Swiss portfolio managers can already conduct some business in the UK without the need for authorisation.

In fact, if a Swiss portfolio manager is relying on the characteristic performance test and/or overseas person exclusion, the preconditions for the exclusion from FSMA are less onerous compared to those under the MRA (e.g. registration with the FCA, client disclosure and consents, etc). Further, the fundamental limitations of the UK overseas persons framework, such as its unsuitability for retail business, are not so different to those of the MRA, which excludes retail clients entirely.

However, the real value of the MRA is the increased scope and certainty that it brings.

- **Broader scope:** The overseas person exclusion does not apply to all activities relevant to portfolio management, but the MRA does cover all UK investment services for which a firm would normally require authorisation under FSMA. The clients covered under the MRA may also include a broader group compared to those under the overseas person exclusion – noting that both regimes capture certain categories of high-net-worth individuals. Further, the MRA explicitly permits onshore visits by Swiss employees, whereas that could place the "characteristic performance" and overseas person exclusion analysis under strain.
- **Greater certainty:** The overseas person exclusion and the "characteristic performance test" are subject to review by HM Treasury (the UK finance ministry). If the UK overseas framework is tightened in the future, we expect the MRA to become the primary framework for Swiss firms providing financial services into the UK.

The short-term impact of the MRA for Swiss portfolio managers is expected to be low. There may however be long-term advantages for firms looking to expand their UK operations and reduce regulatory risk.

3. What will change for UK portfolio managers providing their cross-border services in Switzerland?

Under the Swiss Financial Services Act ("**FinSA**"), UK portfolio managers benefit from a rather liberal cross-border regime and can provide portfolio management services to clients in Switzerland in compliance with limited regulatory requirements. The scope of these regulatory requirements varies depending on the categories of clients targeted in Switzerland. In particular, for so-called opted-out high-net-worth individuals within the meaning of the FinSA, they include compliance with certain rules of conduct and the implementation of organizational measures, a client advisor registration and the affiliation with an ombudsman office.

With the entry into force of the MRA, the client advisor registration requirement is lifted for UK financial services providers who provide portfolio management services to opted-out high-net-worth individuals or private investment structures created for them with assets of at least CHF 2,000,000. The non-application of the client advisor registration requirement presupposes that the following conditions are fulfilled:

- the UK portfolio manager has sufficient knowledge of the FinSA code of conduct, the necessary expertise with respect to the services provided, professional indemnity insurance coverage or equivalent collateral and is affiliated with a recognized ombudsman – these requirements are in line with the ones that must be met in the context of the client advisor registration,
- the UK portfolio manager notifies the FCA of its intention to provide portfolio management services in Switzerland before starting its activities, and
- the UK portfolio manager makes certain mandatory disclosures (i.e. their name and regulatory status, the fact that the client advisor registration requirement does not apply and information relating to the ombudsman affiliation) to the Swiss-based clients before commenting its activities. The details of these disclosures are to be further specified by FINMA.

All other regulatory requirements currently applicable to UK portfolio managers providing their services in Switzerland on a cross-border basis remain unchanged.

4. What is the expected practical impact of the Convention?

In our view, the MRA will not have any substantial impact on portfolio managers from both a Swiss and UK perspective. The agreement sends however a strong signal and lays out the grounds for further cooperation in the future. The MRA is indeed a starting point for further development with the active involvement of FINMA and the FCA. A possible expansion of the scope of the MRA is actually provided in the agreement itself.

Finally, it is to be noted that the timing of the ratification by the UK and Swiss governments is currently uncertain. The ratification could take place at the end of 2024 or the beginning of 2025.

Bibliographies

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