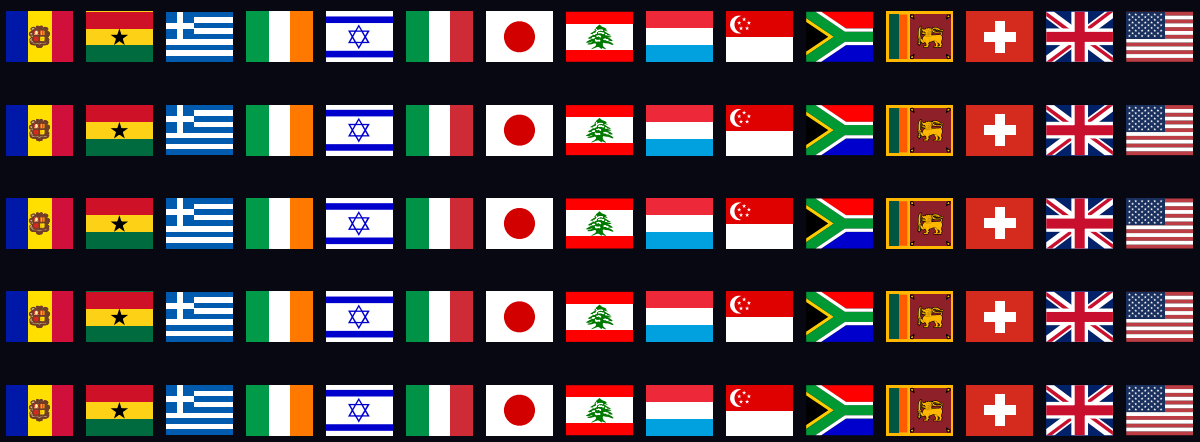
BANKING REGULATION

Switzerland



LEXOLOGY
Getting The Deal Through

Consulting editor
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Banking Regulation

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; supervision and enforcement; resolution; capital requirements; ownership restrictions and implications; changes in control; and recent trends.

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UPDATE AND TRENDS

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REGULATORY FRAMEWORK

Key policies

What are the principal governmental and regulatory policies that govern the banking sector?

The Swiss banking sector is subject to the supervision of the Swiss Financial Market Supervisory Authority (FINMA).

FINMA licences are granted to legal entities that pursue banking activities, not to their managers or shareholders. The licensing requirements are set out in the Swiss Federal Act on Banks and Savings Banks (the Banking Act). Among other things, the applicant must establish that the persons entrusted with the management enjoy a good reputation and thereby assure proper conduct of business operations (ie, guarantee of irreproachable activity). If, at a later stage, any of the licence requirements are no longer satisfied, FINMA may take administrative measures that include, in extreme cases, withdrawal of the banking licence.

One of the most highly publicised aspects of Swiss banking regulation is Swiss banking secrecy. Unauthorised disclosure of information pertaining to the client–bank relationship is prohibited under the Banking Act.

Law stated - 01 January 2023

Regulated institutions

What are the defining characteristics of a bank to be caught by the banking laws and regulations? Is non-bank fintech regulated differently?

From a Swiss perspective, a 'banking activity' means accepting deposits from the public (or by way of refinancing from other banks) for the purpose of financing a large number of persons or entities. Banking activities may only be conducted in or from Switzerland if the relevant entity has been granted a licence by FINMA.

In 2019, the Banking Act was amended to introduce the 'fintech licence'. This licence involves less stringent requirements than a traditional banking licence and allows deposits to be accepted from the public, provided that:

- the aggregate amount of deposits does not exceed 100 million Swiss francs;
- the deposits do not bear interest (and are not otherwise remunerated); and
- the deposits are not reinvested by the company (ie, they are not used for on-lending purposes).

Law stated - 01 January 2023

Do the rules vary depending on the size or complexity of the banking institution?

While the general rules are the same for all banks, FINMA assigns Swiss banks to five supervisory categories. Banks are grouped into such categories as a function of their total assets, assets under management and capital. Categories 1 and 2 include systemically important financial institutions (SIFIs), which currently consist of UBS, Credit Suisse, PostFinance AG, Raiffeisen Schweiz Genossenschaft and Zürcher Kantonalbank. FINMA conducts risk-oriented supervision that focuses on large, important and complex market participants. Conversely, institutions in categories 4 and 5 are supervised on the basis of quantitative indicators and only looked at more closely when issues arise. The capital adequacy target also varies depending on the applicable category of the relevant bank.

A specific regime for small banks has been introduced by FINMA for banks belonging to categories 4 and 5. The Liquidity Ordinance provides for a relaxation of the liquidity coverage ratio requirements for small banks, while the Capital Adequacy Ordinance (CAO) provides for simplified rules for calculating capital requirements for small,

particularly liquid and well-capitalised banks and securities firms (eg, to forego the calculation of risk-weighted assets). The small bank regime, which is voluntary, also implies a reduction in audit frequency. In its 2021 annual report published in April 2022, FINMA announced that 57 banks were taking part in the small bank regime.

Law stated - 01 January 2023

Primary and secondary legislation

Summarise the primary statutes and regulations that govern the banking industry.

The Banking Act is the main statute governing banking activities in or from Switzerland. The provisions of the Banking Act are detailed in several implementing ordinances issued by the government and by FINMA.

In addition, FINMA has issued a series of circulars setting out its interpretation of the regulatory framework. These regulations are complemented by the Federal Act on the Swiss Financial Market Supervisory Authority , which is a framework law governing the supervisory activities and instruments of FINMA.

Pursuant to the Swiss Federal Act on Financial Institutions (FinIA), a Swiss bank may, under its banking licence, act as a securities firm. Securities firms' activities are governed by the Swiss Federal Act on Financial Services (FinSA), as well as the Swiss Federal Act on Financial Markets Infrastructures and Market Conduct in Securities and Derivatives Trading Act (FMIA) and their applicable implementing ordinances. From a Swiss law perspective, securities firms may act, on a commercial basis, as:

- market makers;
- brokers operating on a short-term basis for their own accounts; and
- brokers acting in their own name for the account of their clients.

Swiss banks also qualify as financial intermediaries within the meaning of the Swiss anti-money laundering legal framework and, as such, fall within the ambit of the Federal Anti-Money Laundering Act (AMLA) and its implementing ordinances. A Swiss bank may also serve as custodian for collective investment schemes. Such activity is subject to the Collective Investment Scheme Act and its implementing ordinances and requires an additional licence from FINMA.

Furthermore, the organisation and operation of financial market infrastructures are governed by the FMIA, which also sets out the general requirements regarding market behaviour rules.

Finally, the Swiss banking sector has a long tradition of self-regulation by industry-sponsored organisations. The Swiss Bankers Association and the Asset Management Association Switzerland regularly issue self-regulatory guidelines to their members, which FINMA recognises as minimum standards that need to be complied with by all Swiss banks. This is particularly true regarding the duty of due diligence in identifying the contracting party and the beneficial owner (the Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence (CDB 20)), the rules of conduct for securities dealing and the guidelines governing portfolio management. An amendment to the CDB 20 is expected to come into effect in 2025.

Law stated - 01 January 2023

Regulatory authorities

Which regulatory authorities are primarily responsible for overseeing banks?

FINMA is the supervisory authority in charge of supervising, in particular:

- banks;
- securities firms;
- collective investment schemes and fund management companies;
- managers of funds and individual portfolios;
- trustees; and
- insurance companies.

Systemic risks are addressed by the Swiss National Bank. FINMA and the Swiss National Bank have agreed on principles to coordinate their respective tasks.

Law stated - 01 January 2023

Government deposit insurance

Describe the extent to which deposits are insured by the government. Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

Deposits with Swiss banks are not, as a rule, insured by any public authority in Switzerland. Special rules apply to cantonal banks, namely banks that are controlled by a Swiss canton (at least one-third of the capital and voting rights must be held by a Swiss canton for a bank to be characterised as cantonal). The relevant cantonal legislation specifies to what extent the liabilities incurred by a cantonal bank are insured by the concerned canton.

In addition, the Banking Act provides for a privileged deposit system if a bank is declared bankrupt. Deposits totalling 100,000 Swiss francs per client are regarded as privileged deposits. Deposits held by a Swiss bank that belong to a foreign bank are also protected by the depositor protection system.

As a first step of the system, privileged deposits are immediately paid out from the remaining liquidity of the bankrupt bank. If the institution's available liquidity does not cover all privileged bank deposits (ie, 100,000 Swiss francs per client), the depositor protection scheme is used as a second step. For that purpose, all Swiss banks are under an obligation to participate in a deposit protection scheme that aims to secure the payment of privileged bank deposits. Such deposits also rank in a privileged class in the bankruptcy estate of the relevant bank.

The deposit protection scheme is limited to a maximum aggregate amount of 6 billion Swiss francs. Banks are required to secure preferential deposits by claims against third parties secured in Switzerland, or by assets in Switzerland, for a total amount corresponding to at least 125 per cent of the preferential deposits that they hold. FINMA may increase this amount or grant derogations.

In addition to this deposit protection scheme, the Banking Act includes specific provisions on reorganisation procedures, prompter repayment of preferential deposits and the continuation of basic banking services during insolvency proceedings.

Unlike cash deposits in bank accounts, assets such as shares, units in collective investment schemes and other securities held in custodial accounts are client property. In the event of bankruptcy of the bank, these assets are ring-fenced in their entirety and released to clients.

On 1 January 2023, amendments to the Banking Act aimed at strengthening the deposit protection scheme entered into force. In particular, the revised Banking Act shortens the deadline for paying out protected customer deposits to seven business days, which is in line with international standards. Further, the bank's contributions to the deposit protection scheme are increased from a fixed sum of 6 billion Swiss francs to a dynamic 1.6 per cent of all protected deposits (currently approximately 7.4 billion Swiss francs). Finally, banks no longer need to secure half of their

obligatory deposit insurance contributions in the form of additional liquidity: this can now be done through depositing securities or Swiss francs in cash with a custodian.

Law stated - 01 January 2023

Transactions between affiliates

Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an 'affiliate' for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

Swiss banking laws do not provide for limitations that expressly apply to transactions between a bank and its affiliates. A bank's transactions with its affiliates may, however, fall under the general limits imposed on a bank's risk exposure towards a single counterparty (or a group of related counterparties) for diversification purposes.

Risk exposure towards one single counterparty or a group of related counterparties exceeding 10 per cent of the bank's capital is to be monitored by the bank and, under certain circumstances, reported to FINMA. As a rule, such risk concentrations cannot exceed 25 per cent of the bank's overall capital. The CAO provides that risk concentrations are to be measured only according to core capital (Tier 1) as supplementary capital (Tier 2) is generally not to be taken into account.

Under Swiss banking laws, entities are considered to be affiliates if they are linked through a controlling relationship (ie, directly or indirectly held with more than 50 per cent of the voting rights or capital, or dominated in any other manner), or by a factual or legal obligation to assist.

A financial group or conglomerate that includes a Swiss bank or securities firm, or is effectively managed from Switzerland, may be subject to FINMA consolidated supervision. In this context, intra-group positions of a Swiss bank would, in principle, fall within the limits imposed on single-risk positions for diversification purposes. Only risk positions towards fully consolidated affiliates may, under certain circumstances, be exempted from these limits.

In terms of capital adequacy requirements, the CAO provides for gone concern capital requirements for SIFIs. This regime provides, inter alia, for an abolition of the full deduction of parent companies' positions held in subsidiaries from core equity capital and of the accompanying relief measures allowed, and for their replacement with the implementation of a risk weighting with weights up to 250 per cent with respect to positions in Swiss-based subsidiaries and 400 per cent with respect to positions in non-Swiss subsidiaries. These requirements relate to the parent companies' capital ratios only, exclusive of consolidated ratios.

Amendments to the CAO entered into force on 1 January 2020. Besides introducing simplified requirements for small banks, the revised CAO aims at ensuring that sufficient gone concern capital is available in the event of a crisis. In particular, certain group entities of systemically important banks – such as their parents or Swiss units performing systemically important functions – need to fulfil, both at a group level and on a stand-alone basis, the specific requirements that systemically relevant banks have to comply with.

Law stated - 01 January 2023

Regulatory challenges

What are the principal regulatory challenges facing the banking industry?

In our view, the principal regulatory challenges facing the Swiss banking industry may be summarised as follows.

Anti-money laundering regulation and implementation of the latest FATF recommendations

The government recently addressed amendments to the AMLA following the fourth Financial Action Task Force (FATF) review of Switzerland, which was conducted in 2016. The initial draft provided for the extension of due diligence obligations to advisory services related to the set-up, management and administration of offshore companies and trusts, regardless of the absence of any purely financial intermediation activity. Such an extension of the scope of AMLA obligations to client advisors was, however, challenged in the course of the parliamentary debates and is no longer included in the final draft of the AMLA, which was adopted on 19 March 2021.

The main amendments focus on the verification of the information provided on the identity of the beneficial owner against reliable sources and on the requirement to periodically review and update the know-your-customer information provided by clients. Further, the revised AMLA 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. This last point aims at allowing the regulatory body to prioritise such filings and treat them in a more efficient manner.

The revised AMLA entered into force on 1 January 2023. In parallel, FINMA revised the FINMA Anti-Money Laundering Ordinance , which now clarifies that, in relation to exchange transactions of virtual currencies for cash or other anonymous means of payment, the threshold for the identification of the contracting party is 1000 Swiss francs for linked transactions within 30 days (and not just per day). The scope of the FINMA Anti-Money Laundering Ordinance has been extended to cover distributed ledger trading facilities.

New Swiss legislation on financial services and financial institutions

On 1 January 2020, the FinSA and the FinIA, along with their implementing ordinances, entered into force, subject to certain transitional provisions. While the purpose of the FinIA is to provide a 'new legal framework' governing all financial institutions, the objective of the FinSA is to regulate financial services, whether provided in Switzerland or on a cross-border basis by non-Swiss providers of financial services.

The introduction of the new FinSA and FinIA involves, inter alia, the following key changes to the Swiss regulatory framework:

1. financial services and institutions are governed in Switzerland by a general set of regulations on the supervision of financial services, embodied in the FinSA, the FinIA and the FMIA;
2. client advisers of non-Swiss service providers, which are not subject to supervision in their home country (or that provide financial services to private clients), must now register in a client advisers register, as a prerequisite to providing financial services to Swiss-based clients;
3. the introduction of categorisation rules based on the EU concept of professional clients and private clients;
4. the implementation of market conduct rules, including the obligation to verify the appropriateness and suitability of financial services, as well as inducements and transparency rules (integrating into the FinSA the most recent case law of the Swiss Supreme Court regarding the transparency and consent requirements for a financial institution to keep trailer fees);
5. the provision of uniform prospectus rules that generally apply to all securities offered publicly into or in Switzerland, as well as a change of paradigm in the enforcement of the claims of investors against financial institutions; and
6. the prudential supervision of independent asset managers and trustees that were previously not subject to prudential supervision.

Regarding point (6), such supervision is conducted by independent supervisory organisations approved and monitored by FINMA. A general transition period of three years, which ended on 31 December 2022, had been granted to existing independent asset managers and trustees. As of 1 January 2023, all active independent asset managers and trustees must be authorised by FINMA (or must have filed their licence application with FINMA by 31 December 2022).

Sustainable finance

Sustainability has been an important topic impacting, among other sectors, the Swiss financial sector and financial institutions active in Switzerland. In June 2020, the Swiss authorities adopted a report and guidelines on sustainability in the financial sector. The report identifies several areas of sustainability that will need to be developed in the future and sets out some guidelines in this context.

On 23 November 2022, the Swiss Federal Council adopted the implementing ordinance on climate disclosures for large Swiss companies. The ordinance provides for the binding implementation of the recommendations of the Task Force on Climate-Related Financial Disclosures by large Swiss companies. In substance, public companies, including banks and insurance companies with 500 or more employees and at least 20 million Swiss francs in total assets or more than 40 million Swiss francs in turnover will be obliged to report publicly on climate issues. Public reporting involves disclosures not only on the financial risk that a company incurs as a result of climate-related activities, but also on the impact of the company's business activities on the climate. This ordinance is scheduled to enter into force on 1 January 2024.

Simultaneously, FINMA has recently been active in this area. In May 2021, it amended its circulars on disclosure to require large banks and insurance companies to provide qualitative and quantitative information in the area of climate-related financial risks. In particular, such financial institutions must disclose the process for identifying, assessing and managing climate-related financial risks (risk management) as well as quantitative information (including a description of the applied methodology) on their climate-related financial risks.

In November 2021, FINMA committed to implementing the recommendations of the Network for Greening the Financial System and issued further guidance on preventing and combating greenwashing. More recently, on 29 November 2022, FINMA published guidance on climate risk disclosures for large banks (supervisory categories 1 and 2) and insurance companies. In this guidance, FINMA analysed how such banks and insurance companies disclose their climate-related financial risks.

At this stage, the approach taken by Switzerland is generally more liberal than that of the European Union in connection with green finance. Initiatives are mainly coming from the industry itself, seeking competitiveness of the Swiss financial sector. In this context, among others, the Asset Management Association Switzerland in cooperation with the Swiss Sustainable Finance Association recently issued certain recommendations on sustainable asset management.

LIBOR replacement

On 4 December 2020, FINMA published a transition roadmap for LIBOR aiming at preparing financial institutions for a discontinuation of LIBOR in various currencies. FINMA considered the end of LIBOR to be one of the main operational risks facing its supervised institutions.

FINMA also issued recommendations in connection with derivatives in March 2020 and July 2021. In particular, it recommended that relevant institutions sign the Fallbacks Protocol, which was developed and published by the International Swaps and Derivatives Association.

In September 2021, FINMA issued additional guidance calling on financial market participants to proceed with the preparations for the LIBOR transition as a matter of the highest priority. FINMA has also set out some best practices to assist financial institutions to overcome the residual risk related to the LIBOR transition.

At the end of 2021, LIBOR ceased to exist in many currencies, including the Swiss franc. SARON (Swiss Average Rate Overnight) has now fully replaced Swiss franc LIBOR.

Law stated - 01 January 2023

Consumer protection

Are banks subject to consumer protection rules?

Swiss regulatory laws do not provide for a specific consumer protection legal framework; however, regarding a certain type of loan, Swiss financial institutions are to observe mandatory provisions that cannot be altered to the detriment of consumers. Loans granted to individuals for purposes other than business or commercial activities, in the range of 500 Swiss francs and 80,000 Swiss francs (providing that the consumer is not obliged to reimburse the credit within less than three months), are subject to the Consumer Credit Act (CCA). The CCA sets out a series of mandatory consumer protection rules, including:

- the consumer credit contracts must be made in writing and comply with a maximum rate of interest set by the authorities (ie, in principle 15 per cent); and
- the consumer credit contracts must list a series of pieces of information, without which they are null and void (eg, the right of the consumer to revoke a line of credit in writing and within seven days of sending or the delivery of the contract to the borrower).

In national and international transactions with consumers and depending on the countries involved, specific consumer protection rules may apply with regard to the determination of the competent jurisdiction.

Law stated - 01 January 2023

Future changes

In what ways do you anticipate the legal and regulatory policy changing over the next few years?

According to FINMA's general strategic goals for the period from 2021 to 2024, the following fall within its main policy challenges:

- safeguarding the stability of supervised financial institutions;
- sustaining positive impact on the conduct of supervised financial institutions;
- ensuring that supervised financial institutions maintain the highest risk management standards and promote responsible corporate governance;
- providing long-term mitigation of the 'too big to fail' risk;
- ensuring that the financial system remains robust in the light of forthcoming structural changes and that clients are able to benefit from new opportunities without being exposed to additional risks;
- promoting innovation in the Swiss financial centre;
- contributing to the sustainable development of the Swiss financial centre by giving particular consideration to climate-related risks; and
- ensuring that the Swiss financial regulation is in line with international standards.

One of the main challenges for the current year is the final stages of the implementation of the FinSA and the FinIA, which constitutes a complete overhaul of the legal framework applicable to financial institutions and the provision of

financial services in Switzerland, including new licensing requirements for portfolio managers and trustees. In this context, hundreds of applications were submitted to FINMA by the end of 2022 and are currently being assessed by the Swiss regulator.

Finally, FINMA intends to strengthen Switzerland's position as one of the leaders in the fintech sector. To this end, the Swiss regulator engaged a number of international bodies to establish a framework aimed at promoting innovation, as well as protecting customers and investors in this area. This includes an amendment to several federal acts to take into account developments in distributed ledger technology, which entered into force in 2021, and the introduction of ledger-based securities that are represented in a blockchain.

Law stated - 01 January 2023

SUPERVISION

Extent of oversight

How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

Swiss banking supervision is based on a division of tasks between the Swiss Financial Market Supervisory Authority (FINMA) and the banks' external auditors.

Pursuant to this two-tier supervision system, the auditors conduct on-site audits, while FINMA retains responsibility for overall supervision and enforcement measures. To a certain extent, the auditors act as an extension (long arm) of FINMA, exercising direct supervision through regular audit checks.

In addition to examining the annual financial statements with an independent valuation of assets and liabilities, the auditors also review whether the banks comply with their articles of association and their organisational rules, as well as with the provisions of Swiss banking laws, the circulars issued by FINMA and any applicable self-regulatory provisions.

External auditors must, on an annual basis, prepare long-form reports addressed to the members of the board of directors of the bank concerned and to FINMA. These reports provide a comprehensive overview of the business activities and the internal organisation of the relevant bank. The purpose of these reports is to allow FINMA to check that the financial institution complies with the regulatory requirements, and that the individuals entrusted with its management enjoy a good reputation and thereby assure the proper conduct of business operations (ie, guarantee of irreproachable activity). These audit reports are the main informational tools through which FINMA exercises its supervision.

In addition to the long-form reports, the auditors are obliged to inform FINMA if they suspect any breach of law or uncover other serious irregularities. FINMA then initiates investigations and takes other measures necessary to ensure compliance with the legal framework and eliminate irregularities.

A special supervisory regime exists for systemically important financial institutions given the systemic risk caused by the size of these institutions. Under such a regime, broadly speaking, FINMA does not exclusively rely on the reports received from the auditors but carries out its own investigations in accordance with its risk-based supervision approach.

Law stated - 01 January 2023

Enforcement

How do the regulatory authorities enforce banking laws and regulations?

The enforcement of Swiss banking laws and regulations is closely linked to the obligation for Swiss banks to ensure compliance, at all times, with the requirements for a banking licence (continuing compliance with the conditions of a banking licence).

If, at any time after the licence has been granted, any of the licence requirements are no longer satisfied, FINMA may take administrative measures aimed to remedy the breach. FINMA may also appoint an investigator to clarify the factual situation and facilitate the implementation of the measures imposed by the authority. Should the breach of the legal and regulatory framework be characterised as serious, FINMA could ultimately withdraw the banking licence, which would trigger the forced liquidation of the bank.

Law stated - 01 January 2023

What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

The most common enforcement issues encountered in the practice of FINMA can be summarised as follows:

- the insolvency procedures and protective measures related to authorised and unauthorised entities;
- procedures against individuals, including entry onto a watch list (ie, a database with information on individuals whose business conduct is questionable or does not meet the respective requirements) and the sending of business conduct letters whereby FINMA informs the individual of its reservations regarding the assurance of proper business conduct;
- compliance with know-your-customer rules set out in the Federal Anti-Money Laundering Act and the Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence, as well as insider trading and market manipulation; and
- the ongoing supervision of licensed entities (especially banks and securities firms), in particular, to ensure that the persons entrusted with the management of these entities fulfil on an ongoing basis the guarantee of irreproachable activity.

FINMA publishes anonymous summaries of its enforcement rulings, as well as references to court decisions and statistics on its enforcement activities.

Law stated - 01 January 2023

RESOLUTION

Government takeovers

In what circumstances may banks be taken over by the government or regulatory authorities? How frequent is this in practice? How are the interests of the various stakeholders treated?

Swiss law does not provide for any specific rules that set out the conditions and situations in which a Swiss bank may be taken over by the government or regulatory authorities.

By contrast, the involvement of the Swiss Financial Market Supervisory Authority (FINMA) in the context of bank reorganisation and liquidation proceedings is expressly addressed in the Swiss Federal Act on Banks and Savings

Banks (the Banking Act) and the implementing FINMA-Bank Insolvency Ordinance .

Along with amendments to the deposit protection scheme, amendments to the Banking Act aimed to increase the effectiveness and legal basis of certain bank resolution measures were adopted by the government in December 2021. In particular, the content of the restructuring plan, the requirement that a restructuring plan needs to comply with the 'no creditor worse off than in liquidation' safeguard test and the available capital measures (cancellation of existing equity and the write-down or conversion of debt into equity) are addressed in the amendments to the Banking Act. These amendments entered into force on 1 January 2023.

Law stated - 01 January 2023

Bank failure

What is the role of the bank's management and directors in the case of a bank failure? Must banks have a resolution plan or similar document?

FINMA requires that Swiss banks have sound business contingency management in place to ensure that critical business functions can be maintained or restored as quickly as possible in the event of a crisis. Systemically important financial institutions (SIFIs) are, in addition, required to have contingency or recovery plans (living wills) in place. The responsibility for the establishment of such plans lies with the bank's board of directors and senior management.

If a bank becomes over-indebted or experiences serious liquidity issues, FINMA can order broad and far-reaching protective measures, which may directly affect the bank's conduct of business as well as the role of the bank's management and directors. These protective measures may be taken independently from, or in addition to, the ordering of formal restructuring or liquidation proceedings. FINMA is, in particular, vested with the power to:

- give direct instructions to the bank's governing bodies;
- limit the powers of the bank's directors or managers, or remove them from office;
- remove the bank's statutory auditors;
- limit the business activities of the bank;
- prohibit the bank from making or accepting payments, or undertaking securities transactions;
- order a temporary stay of a counterparty's right to enforce a debt against the bank; and
- order a temporary stay of any contractual termination or termination of a counterparty right with respect to any contracts (subject to certain conditions).

Law stated - 01 January 2023

Are managers or directors personally liable in the case of a bank failure?

Swiss law does not provide for a specific liability regime applicable to directors or managers of a bank. Should the bank's failure result from an intentional or negligent breach of the directors' or managers' duties, the general rules of Swiss company law would apply to determine the managers' or directors' personal liability for the damage caused to the company, its shareholders or creditors.

This liability for mismanagement must be distinguished from the liability regime applicable to the (managing or non-managing) partners of Swiss banks that have the legal form of a partnership or a limited partnership (often referred to as Swiss private banks). In the case of bankruptcy of a Swiss private bank, the partners with unlimited liability would be jointly and severally liable with their own personal assets.

Law stated - 01 January 2023

Planning exercises

Describe any resolution planning or similar exercises that banks are required to conduct.

In line with international and domestic standards, SIFIs must have both a recovery and a resolution plan aimed at identifying risks with respect to the stability of the financial system owing to their systemically important nature and determining viable ways to deal with the impact of a crisis.

In accordance with the Banking Ordinance, a SIFI must establish a recovery plan that contains the measures that it would take in case of crisis and that would allow it to pursue its activities without requiring governmental funds. Responsibility for drafting and regularly updating the recovery plan rests with the executive board level of the SIFI and must be embedded in a viable corporate governance framework. The recovery plan, as well as any amendment of it, is subject to FINMA's approval. Provided that the legal requirements are met, FINMA approves the recovery plan and then elaborates a resolution plan on its own, based on the information provided by the SIFI. The resolution plan presents how, in concrete terms, a recovery measure or a SIFI liquidation could take place.

On 24 March 2022, FINMA confirmed that all SIFIs have recovery plans in place, while the emergency plans of the domestic systemically important banks PostFinance AG, Raiffeisen Schweiz and Zürcher Kantonalbank are not ready to be implemented despite the expiration of the respective deadline.

Law stated - 01 January 2023

CAPITAL REQUIREMENTS

Capital adequacy

Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

The granting of a banking licence is 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. In practice, the Swiss Financial Market Supervisory Authority (FINMA) determines in each case the appropriate level of capital with regard to the scope of the contemplated activities. Capital adequacy and measurement rules are detailed in the Capital Adequacy Ordinance (CAO), the Liquidity Ordinance (LiqO) and the FINMA Circular 2015/2 'Liquidity risks – banks' .

In accordance with Basel III requirements, the CAO requires a risk-weighted capital ratio that rises with increasing size, as well as an unweighted capital adequacy requirement for all non-systemically important banks. A safety net in the form of a leverage ratio has been implemented with this capital adequacy requirement based on the leverage ratio. In this context, a minimum core capital (Tier 1) to a total exposure ratio of 3 per cent is now required for all non-systemically important financial institutions (SIFIs). FINMA Circular 2015/3 'Leverage ratio' enables banks to also apply the Basel III standard approach for derivatives when calculating the leverage ratio.

Revised risk diversification provisions in the CAO entered into force on 1 January 2019. Under these rules, risk concentrations are measured only according to core capital (Tier 1), meaning that supplementary capital (Tier 2) is generally no longer taken into account. Moreover, banks are allowed only very restricted use of models for determining their risk concentrations, as modelling errors have a major impact when calculating these risks.

Further changes concern overruns of the upper limits set out in the CAO (large exposures exceeding 25 per cent of core capital are generally no longer permitted) and the weighting of certain assets, as well as the adjustment of some special rules for systemically important banks. The revised risk diversification provisions in the CAO are supplemented by the revised FINMA Circular 2019/1 'Risk diversification – banks' .

With regard to quantitative liquidity requirements applied to non-systemic banks, the LiqO provides for two minimum standards: a liquidity coverage ratio (LCR) and a net stable funding ratio (NSFR).

The LCR was introduced to ensure that banks hold a liquidity buffer to offset increased net cash outflows under a specified 30-day stress scenario. According to the LiqO, non-systemic banks were to comply with 60 per cent of the LCR's requirements as of 1 January 2015. By each of the following three years, they have to comply with an additional 10 per cent until they have complied with 90 per cent of the LCR's requirements for 2018 (phase-in until 1 January 2019).

The NSFR, which requires non-systemic banks to have sufficient stable funding available to cover illiquid assets, initially had to be implemented in January 2018; however, owing to delays with the introduction of the NSFR in the European Union and the United States, the Swiss Federal Council decided in November 2017, and again in November 2018, to postpone the implementation of the NSFR. In November 2019, the Swiss government decided to implement the NSFR by mid-2021, in line with its expected implementation in the European Union and the United States. The revised LiqO was adopted by the Swiss government in September 2020 and entered into force on 1 July 2021, along with the revised FINMA Circular 2015/2 'Liquidity risks – banks'.

With regard to SIFIs, the CAO sets out a specific capital adequacy regime. The CAO calls for more stringent requirements in relation to the bank's risk-weighted assets, which broadly comprise:

- a basic requirement of leverage ratio of 4.5 per cent, in line with the Basel III minimum requirements applicable to all banks;
- an additional component of risk-weighted assets of 12.86 per cent; and
- a surcharge.

These requirements must not fall below 3 per cent with respect to the leverage ratio and 8 per cent with regard to the risk-weighted assets that the SIFI is to maintain at all times. With regard to the surcharge, its size is set with respect to the degree of systemic importance (ie, the total exposure and the market share of the relevant SIFI). SIFIs also have to satisfy countercyclical equity buffers and leverage ratio requirements. In addition to capital, liquidity, organisational and risk diversification requirements, the applicable regime also entails provisions that allow the government to order adjustments to the remuneration system of a bank that would have to rely on government funding.

Finally, in January 2022, the Swiss Federal Council approved the proposal of the Swiss National Bank to reactivate the countercyclical capital buffer as a result of the vulnerabilities on the mortgage and residential real estate markets; therefore, from 30 September 2022, banks must hold additional capital of 2.5 per cent for residential mortgages to address the increasing risks on the mortgage and real estate markets.

Law stated - 01 January 2023

How are the capital adequacy guidelines enforced?

Enforcement of the capital adequacy requirements is part of the ongoing supervision process aimed to ensure that the requirements of the banking licence are met. Compliance with capital adequacy requirements has to be reported to the Swiss National Bank on a quarterly basis and is one of the topics addressed in the long-form reports issued by the bank's external auditors on an annual basis.

Law stated - 01 January 2023

Undercapitalisation

What happens in the event that a bank becomes undercapitalised?

FINMA benefits from an exclusive competence to intervene in the event of a bank's undercapitalisation.

Upon the occurrence of a risk of undercapitalisation or insolvency, FINMA can take various protective measures, such as a moratorium of claims. Further, if needed, FINMA may appoint a trustee in charge of the bank's reorganisation. The bank is then to propose to FINMA a reorganisation plan with the purpose of protecting the bank's creditors. Such a scheme generally aims to recapitalise the bank, for example, through converting debt into equity.

As a result of the 2008 financial crisis, FINMA was also granted additional powers with a view to increasing the likelihood of successful restructuring of a distressed bank. FINMA may:

- order the transfer of all or part of the bank's activities to a bridge bank;
- compel a conversion of certain convertible debt instruments issued by the bank (eg, contingent convertibles) or a reduction (or cancellation) of the bank's equity capital, or both; and
- as an ultima ratio, order the conversion of the bank's debt obligations into equity.

FINMA is also authorised to liquidate insolvent banks, in particular if no reorganisation is possible. These measures are set out in more detail in the FINMA-Bank Insolvency Ordinance.

Moreover, the Swiss Federal Act on Banks and Savings Banks allows FINMA to couple any protective measure or reorganisation measure with a temporary stay of any contractual termination or termination right of a counterparty with respect to any contracts or the exercise of certain netting, realisation and transfer rights (which prevail in the absence of a stay ordered by FINMA) for up to 48 hours. In this context, the Banking Ordinance generally requires, for enforceability purposes, that banks only enter into new agreements or agree to amendments to agreements, which are subject to foreign law or provide for a foreign jurisdiction, provided that the counterparty acknowledges FINMA's stay right. This obligation is further specified in the FINMA-Bank Insolvency Ordinance. Accordingly, agreements entered into by foreign group entities are only subject to this obligation if the relevant financial contract was guaranteed or otherwise secured by a Swiss bank or securities firm.

Law stated - 01 January 2023

Insolvency

What are the legal and regulatory processes in the event that a bank becomes insolvent?

FINMA has the authority to intervene if a bank becomes insolvent.

Law stated - 01 January 2023

Recent and future changes

Have capital adequacy guidelines changed, or are they expected to change in the near future?

In addition to the special capital adequacy regime and the leverage ratio regime imposed on Swiss SIFIs, FINMA has implemented capital adequacy and liquidity rules in line with international standards. For banks to build up the required capital and replace or phase out capital that no longer qualifies under the new rules, transitional rules provided for an implementation schedule over a period stretching to 2019.

The evolution of the standards issued by the Basel Committee on Banking Supervision, changes to the Banking Ordinance and the CAO, and amended international accounting standards necessitated changes to a number of FINMA circulars. This revision of FINMA circulars is one of the final steps in the national implementation of the Basel III standards. The implementation of the net stable funding ratio and the revised standards published by the Basel Committee on Banking Supervision in December 2017 entered into force on 1 July 2021.

In January 2019, amendments to the CAO entered into force. The revisions focused on capital requirements for any restructuring and resolution (gone concern requirements). Following the introduction of such gone concern capital requirements for UBS and Credit Suisse in 2016, these now also apply to the other SIFIs (ie, PostFinance AG, Raiffeisen Schweiz Genossenschaft and Zürcher Kantonalbank). The amended CAO also provides for rules for the treatment of SIFIs' stakes in their subsidiaries. Further amendments to the CAO were introduced in January 2020 to ensure that the parent entities of SIFIs are sufficiently well capitalised in the event of a crisis.

In line with the Basel III banking standards, the Swiss Federal Council is currently in the process of adjusting the CAO. Simultaneously, FINMA conducted a consultation process, which ended on 25 October 2022, in relation to five new FINMA ordinances for the purpose of introducing final Basel III standards. In substance, these standards will change the rules for calculating capital requirements, particularly for credit and market risks as well as for operational risks. Besides increasing the risk sensitivity of the capital requirements, the new rules seek to improve the comparability of the capital requirements and key indicators based on these. In particular, the requirements for operational risks will need to be calculated using a single standardised approach.

Further, an output floor will ensure that from 2028, the risk-based capital requirements for banks with model approaches are not below 72.5 per cent of the requirements calculated using standardised approaches. It is currently expected that this new regulatory framework will enter into force on 1 July 2024.

Law stated - 01 January 2023

OWNERSHIP RESTRICTIONS AND IMPLICATIONS

Controlling interest

Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank (or non-bank). What constitutes 'control' for this purpose?

For the purposes of the Swiss Federal Act on Banks and Savings Banks (the Banking Act), a participation is deemed to be a qualified participation if it amounts to 10 per cent or more of the capital or voting rights of the bank or if the holder of the participation is otherwise in a position to significantly influence the business activities of the bank. In addition, the Swiss Financial Market Supervisory Authority (FINMA) typically requires the disclosure of participations of 5 per cent or more for its assessment of whether the requirements of a banking licence are continuously met.

The Banking Act does not set any restrictions on the type of entities or individuals holding a controlling interest in a bank. However, one of the general requirements for a bank to obtain a licence is that individuals or legal entities holding, be it directly or indirectly, a qualified participation in a bank must ensure that their influence has no negative impact on the prudent and reliable business activities of the bank; therefore, the bank's shareholders and their activities can be relevant for the granting and the maintenance of a banking licence.

Examples of circumstances where shareholders with a qualified participation may have a negative influence on the bank are a lack of transparency, unclear organisation or financial difficulties of financial conglomerates, or an influence of a criminal organisation on the shareholder. Should FINMA be of the view that the requirements for the banking licence are no longer met because of a shareholder with a qualified participation, it may suspend the voting rights in relation to such a qualified participation or, if appropriate and as a measure of last resort, withdraw the licence, which would trigger a liquidation proceeding.

Law stated - 01 January 2023

Foreign ownership

Are there any restrictions on foreign ownership of banks (or non-banks)?

If foreign nationals with qualified participations directly or indirectly hold more than half of the voting rights of, or otherwise a controlling influence on, a bank incorporated under Swiss law, the granting of the banking licence is subject to additional requirements. In particular, the corporate name of a foreign-controlled Swiss bank must not indicate or suggest that the bank is controlled by Swiss persons, and the jurisdictions where the owners of the qualified participation have their registered office or domicile must grant 'reciprocity', which means that:

- Swiss residents and Swiss entities must have the possibility to operate a bank in the relevant country; and
- such banks operated by Swiss residents are not subject to more restrictive provisions compared to foreign banks in Switzerland.

The reciprocity requirement is subject to any obligations to the contrary in governmental treaties and is, therefore, not applicable to World Trade Organization member states. Furthermore, FINMA may request that the bank be subject to adequate consolidated supervision by a foreign supervisory authority if the bank forms part of a group active in the financial sector.

If a bank incorporated under Swiss law becomes foreign controlled as described above or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, a new special licence for foreign-controlled banks must be obtained prior to such event. For the purposes of the Banking Act, a foreigner is:

- an individual who is not a Swiss citizen and has no permanent residence permit for Switzerland; or
- a legal entity or partnership that has its registered office outside Switzerland or, if its registered office is in Switzerland, is controlled by individuals as defined above.

Law stated - 01 January 2023

Implications and responsibilities

What are the legal and regulatory implications for entities that control banks?

There are no restrictions regarding the business activities of the entities holding qualified participations in a bank, provided that the conditions for the granting and maintenance of the licence are complied with. Generally, transactions between the (controlling) shareholders of a bank and the bank itself may be subject to specific requirements (eg, the granting of loans to significant shareholders must be in compliance with generally recognised banking principles).

Law stated - 01 January 2023

What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

Each controlling shareholder has the duty to give notification of the acquisition or disposal of a qualified participation, as well as of its participation reaching, exceeding or falling below certain thresholds. Further, the holder of a qualified

participation must not negatively influence the prudent and reliable business activities of the bank, as doing so may cause the bank to lose its licence.

In cases where justified concerns exist that a bank is over-indebted, no longer complies with the capital adequacy rules or has serious liquidity problems, FINMA may order certain protective measures and the establishment of a recapitalisation plan. Under a recapitalisation plan, the rights of creditors and shareholders may be impaired.

Law stated - 01 January 2023

What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

There are no specific implications for a controlling shareholder of a bank if the bank becomes insolvent; however, if a bank becomes insolvent, FINMA has broad authority to intervene and to take protective or reorganisation measures to protect the bank's creditors. Such measures may have indirect implications for the shareholders.

Law stated - 01 January 2023

M&A AND CHANGES IN CONTROL

Required approvals

Describe the regulatory approvals needed to acquire control of a bank (or non-bank). How is 'control' defined for this purpose? Do the requirements differ depending on the size or complexity of the institution?

The acquisition of a qualified participation in a bank by a Swiss individual or a Swiss entity triggers a reporting requirement to the Swiss Financial Market Supervisory Authority (FINMA). All individuals and legal entities must report to FINMA before directly or indirectly buying or selling a qualified participation in a bank. FINMA will examine whether the influence of the new shareholder with a qualified participation would be detrimental to the prudent and reliable business activities of the bank, and will intervene if necessary.

Foreign-controlled banks must apply to FINMA for an additional licence when the foreign holders of qualified participations change. The requirements for such additional licence do not differ depending on the size or complexity of the financial institution.

Law stated - 01 January 2023

Foreign acquirers

Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

The bank must apply to FINMA for an additional licence when foreign nationals directly or indirectly hold more than half of the votes of, or otherwise a dominant influence on, the bank. If the transfer to foreign control causes the bank to become part of a financial group, FINMA requires the foreign supervisory to give its consent and be in a position to ensure consolidated supervision of the group as a whole (including the Swiss institution).

Law stated - 01 January 2023

Under what circumstances can a foreign bank (or non-bank) establish an office and engage in business? For example, can it establish a branch or must it form or acquire a locally chartered bank?

A foreign bank needs to be authorised by FINMA as a branch if it employs staff in Switzerland who, on a professional basis, permanently carry out transactions or manage client accounts on its behalf in or from Switzerland that give rise to legal obligations. Likewise, a foreign bank is to obtain an authorisation from the Swiss regulator if it employs people who, permanently and on a professional basis, carry out activities in or from Switzerland that are not sufficient to indicate a branch, such as representation activities (eg, advertising).

The licensing requirements for a branch and a representative office (to a lesser extent) are similar to the ones applicable to a domestic Swiss bank, with the exception of the capital requirements (although financial collateral for a branch may be required by FINMA). It is also required that the foreign bank be subject to appropriate supervision, which includes the Swiss branch or the representative office. Further, with respect to Swiss branches, if the foreign banks form part of a group active in the financial sector, appropriate consolidated supervision of the group by foreign supervisory authorities is required.

Alternatively, a foreign bank may also choose to acquire a locally chartered bank. An additional licence will also be required for this purpose.

Law stated - 01 January 2023

Factors considered by authorities

What factors are considered by the relevant regulatory authorities in an acquisition of control of a bank (or non-bank)?

FINMA generally considers whether the requirements for the banking licence are still met and, in particular, whether the new shareholders with a qualified participation will not negatively influence the bank's prudent and reliable business activities.

Law stated - 01 January 2023

Filing requirements

Describe the required filings for an acquisition of control of a bank. Do the requirements differ depending on the size or complexity of the institution?

Each individual or legal entity must notify FINMA prior to acquiring or selling a direct or indirect qualified participation in a bank organised under Swiss law. This notification duty also applies if a qualified shareholder increases or reduces its qualified participation and attains, falls below or exceeds 10, 20, 33 or 50 per cent of the capital or voting rights in the bank. The notification must include a declaration of whether the participation is held for its own account and whether any options or similar rights have been granted over the participation.

The bank itself is also required to notify FINMA of any changes that trigger the notification duty of the shareholders once it becomes aware of such a change and, in any case, at least once per year.

In the case of a foreign-controlled bank, prior to any change of a foreign holder of a qualified participation, the bank must apply to FINMA for a special licence. In its application, the bank has to demonstrate all the facts based on which FINMA may assess whether the conditions for the special permit are satisfied.

The requirements set out above apply irrespective of the size or complexity of the financial institution.

Law stated - 01 January 2023

Time frame for approval

What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

Generally, the timing of the approvals or statements by FINMA largely depends on its workload. The process for a special banking licence in the case of a foreign-controlled bank may take three months; however, if the country of domicile or residence of the foreigner is not a World Trade Organization member state, the process may take significantly longer. FINMA will have to assess whether that country grants the right of reciprocity.

If the acquirer is not a foreigner, there is no formal approval or licence required; therefore, a FINMA statement is generally available within a shorter time frame.

Law stated - 01 January 2023

Regulatory trends

Are there any notable recent regulatory trends or developments affecting M&A and changes in control in the banking sector?

M&A activity in the Swiss banking sector has accelerated in recent years. The total number of Swiss banks has actually diminished over the last few years as a result of mergers between small-sized banking institutions that were having difficulty addressing increasing regulatory requirements. This is particularly the case for the Swiss wealth management and private banking sector. It is expected that consolidation will continue to play an important role for banks primarily active in wealth management in the coming years. Further, non-Swiss market players wishing to establish a banking presence in Switzerland regularly acquire control of, or significant participation in, existing Swiss banking institutions. That being said, reciprocity and consolidated supervision may be obstacles depending on the jurisdiction of domicile of the qualified participants, and the ability of the local supervisory authorities to ensure consolidated supervision.

Law stated - 01 January 2023

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in banking regulation in your jurisdiction?

On 1 January 2020, the Swiss Federal Act on Financial Services (FinSA) entered into force. This new legislation is fully applicable as of 1 January 2022. The FinSA regime represents a major change both for domestic banks and foreign banks that provide financial services to Swiss-based clients. The definition of financial services under the FinSA is restricted to:

- the acquisition or disposal of financial instruments;
- the receipt and transmission of orders in relation to financial instruments;
- asset management;
- investment advice; and
- the granting of loans to finance transactions with financial instruments.

The provision of financial services to clients in Switzerland on a cross-border basis falls within the scope of the FinSA. The following FinSA rules, therefore, apply to foreign financial service providers, unless the financial service is the result of reverse solicitation:

- client classification according to the new client categories (private, professional and institutional clients);
- compliance with organisational measures and rules of conduct (eg, information, suitability, documentation, reporting, transparency and duty of care);
- affiliation with an ombudsman's office; and
- registration in a client advisers' register for the client advisers of foreign financial service providers acting in Switzerland on a cross-border basis, it being noted that an exemption is available if such foreign financial service providers are prudentially supervised in their home jurisdiction and if the financial services are solely rendered to Swiss-based professional and institutional clients.

On 13 December 2022, the Swiss Financial Market Supervisory Authority (FINMA) published a fully revised circular on operational risks at banks: FINMA Circular 2023/1 'Operational risks and resilience – banks' . This circular will replace Circular 2008/21 'Operational risks - banks' as of 1 January 2024. Through this revision, FINMA took account of technological developments and clarified its supervisory practice with regard to the management of operational risks, in particular in relation to information and communication technology, critical data and cyber risks as well with regard to the business continuity management. The circular also adopts the revised principles on managing operational risks and new principles on operational resilience published by the Basel Committee on Banking Supervision in March 2021.

As of 1 January 2024, this circular will also replace the Swiss Bankers Association's Recommendations for Business Continuity Management . In this context, gradual transitional provisions for ensuring operational resilience will apply over a two-year period.

Law stated - 01 January 2023

Jurisdictions

Andorra	Cases & Lacambra
Ghana	WTS Nobisfields
Greece	Zepos & Yannopoulos
Ireland	Dillon Eustace LLP
Israel	Arnon, Tadmor-Levy
Italy	Ughi e Nunziante
Japan	TMI Associates
Lebanon	Abou Jaoude & Associates Law Firm
Luxembourg	Loyens & Loeff
Singapore	WongPartnership LLP
South Africa	White & Case
Sri Lanka	Tiruchelvam Associates
Switzerland	Lenz & Staehelin
United Kingdom	1 Crown Office Row
USA	Debevoise & Plimpton