
Annex 2: Situation analysis and areas of action in market access

Table of contents

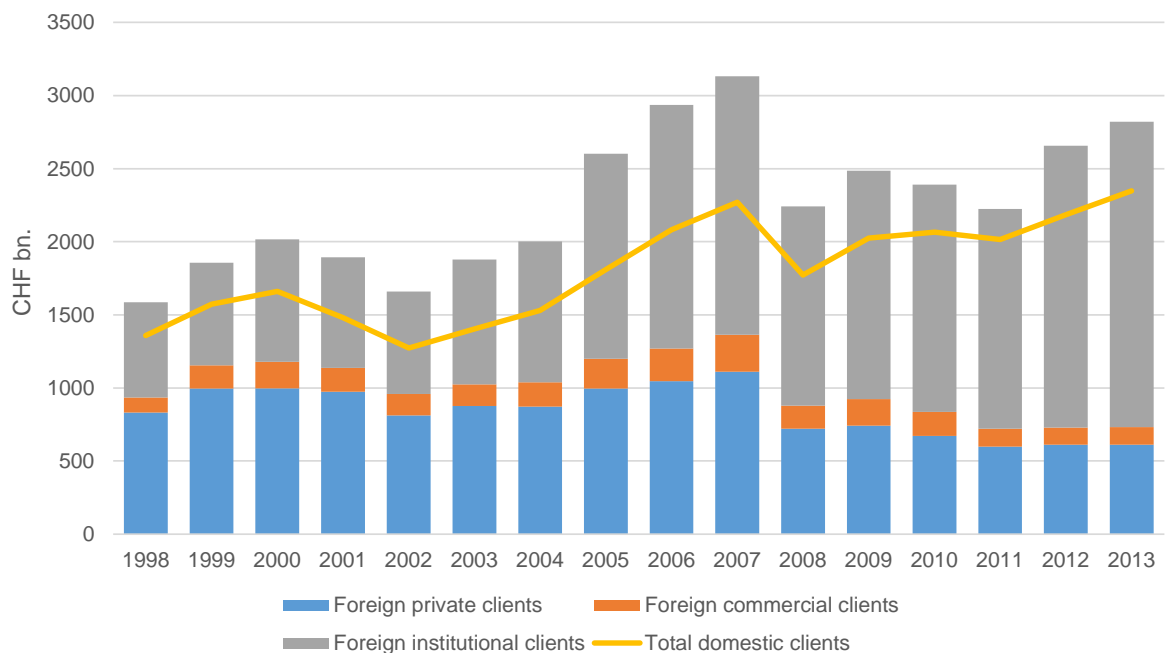
Section 1: BACKGROUND	3
1.1 The importance of market access	3
1.2 Analyses conducted by the authorities so far and mandate of this subgroup	4
1.3 The term "market access" and associated business activities	5
1.4 Focus and structure of report	6
Section 2: SITUATION ANALYSIS FROM THE STANDPOINT OF THE INDUSTRY	8
2.1 Foreign presence and business volume	8
2.1.1 EU/EEA area	8
2.1.2 USA	9
2.1.3 Growth markets (Central and Eastern Europe, Middle East, Asia, Latin America)	10
2.1.4 Outlook for selected other business areas	11
2.2 Foreseeable changes in market access and repercussions	13
2.2.1 EU/EEA area	13
2.2.2 USA	14
2.2.3 Growth markets (Central and Eastern Europe, Middle East, Asia, Latin America)	15
2.3 Summary of situation analysis	15
Section 3: POTENTIAL AREAS OF ACTION FOR SWITZERLAND	19
3.1 Basis: existing financial market policy	19
Excursus: The equivalency approach in relations with the EU	21
3.2 Area of action 1: Market access agreements with EU member states	22
3.2.1 Legal and institutional aspects	22
3.2.2 Economic aspects	24
3.3 Area of action 2: Financial services agreement with the EU	24
3.3.1 Legal and institutional aspects	24
3.3.2 Economic aspects	26
3.4 Area of action 3: Global orientation – bilateral	26
3.4.1 Legal and institutional aspects	26
3.4.2 Economic aspects	27
3.5 Area of action 4: Global orientation – multilateral	28
3.5.1 Legal and institutional aspects	28
3.5.2 Economic aspects	29
3.6 Areas of action: summary	29
Appendix: Members of the "Market Access" Subgroup	31

Section 1: BACKGROUND

1.1 The importance of market access

It is important for the Swiss financial centre to safeguard its position as one of the world's leading financial centres and consolidate that position in the future. Open markets contribute to the international competitiveness of the financial sector, and enable service providers to exploit market opportunities abroad. Given its small domestic market, Swiss financial intermediaries are reliant on good market access conditions abroad, whereby from Switzerland's perspective the provision of services to clients domiciled in other countries is of particular significance. For example, according to statistics drawn up by the Swiss National Bank, out of the total securities held by the banks in Switzerland, the securities holdings of foreign custody account holders (CHF 2,820 billion) exceed those of domestic clients (CHF 2,348 billion) (see Figure 1).¹ Of this figure, independent asset managers account for a share of some CHF 560 billion.² Indeed, estimates indicate that Switzerland is one of the world's leading investment locations for assets invested outside a client's country of domicile.^{3 4}

Figure 1: Securities holdings of foreign clients with Swiss banks by client segment (1998-2013)



Source: SNB, Banks in Switzerland 2013

Preservation and further facilitation of access to the EU/EEA area is of great importance to the Swiss financial market. At the same time, the role of growth markets – particularly in Central

¹ Source: SNB, Banks in Switzerland 2013, June 2014; values given as at end December 2013.

² Source: ZHAW, Regulatory impact assessment of the Federal Financial Services Act (FFSA) and the Financial Institutions Act (FinIA), Annex 2, 26 June 2014.

³ Source: BCG, Global Wealth 2014: Riding a Wave of Growth, June 2014.

⁴ Around a half of the value creation of the banks stems from the wealth management business (source: SBA). In addition, this business is significant for employment. As at the end of 2013, out of a total figure of 209,600 persons employed by the financial sector (source: SFSO), 127,137 persons were employed by the banks (source: SNB). Independent asset managers employed an estimated 7,500-8,500 staff (source: ZHAW).

Europe, the Middle East, Asia, and Latin America – has significantly increased in recent years and continues to do so. This can also be gleaned from the latest estimates, which conclude that more than 31% of globally invested assets come from Western Europe, just under 25% from Asia, some 19% from the Middle East (incl. Africa), approximately 12% from Latin America, approximately 9.5% from North America, and just over 3.5% from Eastern Europe.²

Market access for the provision of financial services by foreign financial intermediaries differs from region to region and from country to country, with varying degrees of openness being evident. Even before the latest global financial and economic crisis, the spectrum of market access conditions ranged from essentially unrestricted market access to a complete ban on foreign financial intermediaries, with conditions of access differing according to the business area in question.

In the aftermath of the financial crisis, financial market regulation was subjected to intense scrutiny, with the primary objective being to strengthen financial systems and increase both transparency and client protection. International initiatives to implement the resolutions of the G20 have triggered a surge of regulatory activity at national/regional level, which is likely to create obstacles for the cross-border financial business. For example, the European Union (EU) has initiated a comprehensive reform of financial market regulation for the EU/EEA area. At the same time, this reform is likely to drive forward harmonisation and integration of the European domestic market for financial services. Market access for third countries in the EU/EEA area is to be regulated in a binding way for all EU member states through greater harmonisation of market access prerequisites for countries outside of this economic area ("third country regimes").

The increased global challenges faced by Switzerland in the area of market access for financial service providers is therefore an expression of the tightening of national/regional regulation, often in response to international standards. Obstacles to market access are springing up not just for Swiss banks, but also for insurers, asset managers, and fund providers. Future earnings development will depend heavily on the countries in which (and the extent to which) market access is regulated for financial institutions both with and without a local commercial presence.

1.2 Analyses conducted by the authorities so far and mandate of this subgroup

The relevant Swiss authorities have already conducted in-depth investigations into the aspect of market access for Swiss financial providers in connection with the second series of bilateral agreements with the EU ("Bilateral II"). However, negotiations over a general services agreement with the EU were suspended by mutual agreement in March 2003. In December 2009, the Federal Council defined its own comprehensive financial market strategy for the first time in its report "Strategic directions for Switzerland's financial market policy". In December 2012, the Federal Council then published its follow-up report on Switzerland's financial market policy.

With a view to preserving and promoting the value creation of internationally-oriented financial activities in Switzerland, the Market Access Subgroup (hereinafter "the subgroup" of the "Further development of the financial market strategy" group of experts was asked to review whether there is a need for additional measures to ensure the sustainable preservation (or improvement of) market access for Swiss providers operating abroad (including cross-border providers as well as those with a local presence). In this context, the subgroup was also asked

to evaluate the extent to which the Swiss financial centre and its regulatory framework should increasingly adopt a global orientation in the future and/or be aligned with that of the EU/EEA area.

1.3 The term "market access" and associated business activities

This report is based on a broad definition of the term market access. This comprehensive definition encompasses the entire provision of financial services for clients not resident/domiciled in Switzerland, including the passive provision of services to foreign clients from Switzerland itself (see below). With a view to preserving market potential abroad, a distinction is made between the following forms of business activity or service provision:

- Business activities involving a "local presence": This term encompasses the marketing/provision of financial services – based on a local license and under local supervision – in the country in which service recipients (existing clients or new clients) have or maintain their place of domicile/residence, through the establishment of a permanent branch (i.e. subsidiary company) in the country in question.⁵
- Business activity involving "provision from Switzerland": Market access, or the provision of services by a Swiss financial intermediary to a foreign recipient (existing/new client) does not involve the establishment of a permanent branch in the country of domicile/residence of the existing/new client as a result of either (a) an employee temporarily staying in the client's place of domicile/residence (i.e. on a business trip), (b) the use of a legally permissible distribution network for the services of the Swiss financial intermediary, including in Switzerland itself, or (c) the use of e-mail, phone, fax, letter, or other remote communication tool. This business activity is referred to as "cross-border" activity throughout this report.
- "Active" business activity: From the standpoint of the Swiss financial centre, business is deemed to be active if a financial institution takes the initiative to conclude transactions with a potential new client. In most countries, transactions with existing clients must be viewed as active business if the marketed type of business or product lies outside of the existing business relationship. Such an initiative on the part of a Swiss financial institution is deemed to exist if this institution targets – either directly or through third parties (such as an intermediary) – an entire market or individual (new) clients, and either markets its services in a targeted way or deliberately instigates the wish of a (new) client to procure its services. Such active business is to be distinguished from passive business. Depending on the prevailing legal parameters, both business activities may be pursued either through a local commercial presence or on a cross-border basis.
- Passive business activity: From the standpoint of the Swiss financial centre, business is deemed to be passive if it is solely undertaken on the basis of an uninfluenced client wish (whereby the requirements in terms of form, content, purpose, and potential influencing of this client wish are treated differently in the statutory guidelines of individual countries). The servicing of legally established existing clients is frequently viewed (at least within the confines of the existing relationship) as passive business (see for example details for EU countries in Recital 30 of MiFID I, or. Article 44a of MiFID II). Distinguishing between active

⁵ Joint ventures are also covered by this definition, i.e. situations where a Swiss financial intermediary holds a (controlling or minority) stake in the capital of another company abroad.

and passive business is particularly relevant in the cross-border business, as passive business is often not subject to foreign licensing requirements.

This report focuses on the following areas of business:

- Private client business: This business comprises two segments. The terms "private banking" and "wealth management" are understood to mean the business with wealthy private clients, whereby individual investment advice, asset management, credit lending, and the securities business are offered in particular. By contrast, the retail banking area encompasses a bank's standardised bulk business with less wealthy clients. In addition to the processing of payment transactions and the opening of saving accounts, this business may also encompass credit lending and securities transactions.
- Asset Management: Asset management is understood to mean the contractually agreed management of the assets of institutional investors, private intermediaries, and private clients, the focus of which lies on investment methods and processes. The selection of investment products (asset allocation) and risk management constitute key services in this business area, whereby these services are provided on the basis of discretionary management mandates or through the appropriate legal structures (e.g. funds, investment companies, family office vehicles such as foundations and trusts). Specifically supporting clients on a day-to-day basis is not the focus of this business. However, professional asset management is increasingly in demand among wealthy private clients, and this business area also encompasses the corresponding investment activity for these clients.
- Corporate client business/investment banking: The corporate client business (corporate banking) involves providing the real economy with a wide spectrum of services. These include credit lending, cash and liquidity management, foreign exchange trading and currency hedging, trade financing, corporate finance, and investment solutions. Investment banking is first and foremost aimed at institutional clients (e.g. companies, banks, insurers, pension funds, hedge funds, brokers, etc.) and also involves the provision of capital market services (e.g. securities trading, equity and bond issues), advisory services (e.g. mergers and acquisitions, corporate divestments) and product development (e.g. structured products).
- Indemnity insurance: Indemnity insurance covers the financial requirement needed to make good specified losses. Specific examples include household contents insurance, natural hazard damage, fire insurance, and flooding/water damage insurance.
- Life insurance: Life insurance provides for a fixed insurance amount to be paid out at a particular point in time or upon the death of the policyholder. Sub-types of this kind of insurance include mixed life insurance, whole life insurance, personal pensions, and permanent total disability insurance.
- Reinsurance: The reinsurance business is aimed solely at direct insurers and other reinsurers, and helps to manage the risks associated with the individual risks or entire portfolios of an individual policyholder.

1.4 Focus and structure of report

This report is restricted to the issue of market access in the sense defined above, and focuses on the regulatory obstacles to market access erected in foreign markets. By contrast, this report does not concern itself with further-reaching difficulties such as tax aspects or additional

costs or implementation obstacles that arise as a result of prudential requirements abroad, particularly for business provided from Switzerland. Restrictions of this kind are an important consideration for the future of the cross-border business, however, and solutions to these problems may likewise have an impact on market access.

The report is structured as follows: Section 2 sets out key information on the significance of business activities provided through a local presence or on a cross-border basis from the perspective of the financial industry, whereby the observations focus primarily on the banking and insurance business. First of all, the current market presence and business volume abroad are highlighted. This is followed by an illustration of the changes to market access anticipated by the financial industry. Finally, Section 3 contains an appraisal of alternative and in some cases complementary areas of action as a potential response of Swiss financial market policy to these challenges. This section flags up the short-term and long-term areas in which Switzerland has some freedom of manoeuvre. The individual areas of action are commented on according to uniform criteria.

Section 2: SITUATION ANALYSIS FROM THE STANDPOINT OF THE INDUSTRY

This section sets out fundamental information on the current market presence of the Swiss financial industry in key foreign markets. It focuses first and foremost on the banking business and the insurance business in their capacity as the most important business areas from a value creation perspective.

2.1 Foreign presence and business volume

2.1.1 EU/EEA area

Banking business

Local presence: Given its close geographical and cultural ties with Switzerland, the EU/EEA area has traditionally been a focal point of the international activity of the Swiss banks. The provision of services through a local commercial presence has in many cases emerged as a second pillar of business alongside the cross-border business in core EU markets such as Germany, the Netherlands, France, Italy, Spain, and the UK. The market coverage of local offices often focuses on different client needs to those of the cross-border business, and provides Swiss banks with strategic alternatives. However, this local business activity is now confronted with a host of challenges. Local representation essentially requires a certain minimum (personnel and economic) size on the part of the institution in question, and its establishment and business activity must be in accordance with additional local statutory guidelines. Compared to providing services from Switzerland, establishing a local commercial presence is cost-intensive, and is therefore typically only worthwhile in larger markets. Moreover, locally established offices face the problem of direct competition from domestic banks. Doing business via a local commercial presence or through the cross-border medium can often be mutually complementary in core markets, as they address different client needs. For example, the latter often provides ways of diversifying the portfolio investments of wealthy private clients.

Provision of services from Switzerland: A focal point of cross-border services provided by the banks in the EU/EEA area is the private client business, with the key business activity being private banking, a service that is largely provided passively. The passive provision of services to retail clients (including cross-border commuters) and the corporate client business are also significant. From a regional perspective, cross-border activity is above all focused on the large EU member states. Cross-border services are particularly attractive to clients looking for geographic diversification of their asset base, or to clients who are dependent on specific Swiss capital market transactions (in CHF). Moreover, the stable legal and political environment of Switzerland is frequently a crucial factor. When looking after foreign clients from Switzerland, the banks can draw on a repository of expertise built up over decades, particularly in the private client business. Furthermore, looking after a number of "bundled" foreign markets from Switzerland allows the banks to exploit synergy effects.

Volumes: Independent forecasts suggest that the total sum of private assets⁶ in Western Europe is growing at a moderate rate, and will amount to around USD 35 trillion in 2015. This

⁶ Sum of all private assets (affluents, high net worth individuals, ultra high net worth individuals) incl. life insurance policies and retirement assets by domicile. Source: OECD and national statistics, 2013.

would make Europe the world's second-largest asset pool after the USA. It is emphasized that the EU is of great importance given the size of its internal market and its geographic proximity, even if certain indications of market saturation are evident.

Insurance business

Local presence: The majority of jurisdictions make it a condition of direct insurance that the provider has a local commercial presence in order to engage in this activity. Given this background, foreign activity via subsidiary companies is by far the most significant form of market activity in the direct insurance business. Since the opening-up of the cross-border business within the EU, the two large Swiss insurance groups have restructured their organizational setups in the EU and now operate from a single EU centre (Ireland and Luxembourg respectively). For reinsurers, the restrictions in the area of branch requirements are less rigorous. For example, no subsidiary company or branch requirement applies for the reinsurance business in many EU states.

Provision of services from Switzerland: The execution of direct insurance business from Switzerland is only permitted by other states in specific branches of insurance such as transportation and air freight insurance. In the reinsurance business, by contrast, there are fewer jurisdictions that prohibit business being operated from third countries such as Switzerland. Large reinsurance groups nonetheless maintain branches or subsidiaries in many jurisdictions as a local presence is demanded by clients.

Volumes: Europe is the world's largest insurance market with a premium volume of more than USD 1,535 billion, compared to a premium volume of around USD 61 billion in Switzerland.⁷ Due to a lower insurance penetration rate in EU member states compared to Switzerland, it would appear that there is growing potential here. In addition, there is significant market potential as a result of average growth rate of retirement savings (pension assets). In industrial insurance too, great market potential could open up if Swiss insurers were also able to offer their expertise in the area of global insurance solutions to multinational corporations in EU member states where they have no local presence.

2.1.2 USA

Banking business

Local presence: The activities of the banks with a local commercial presence in the USA encompass all business areas (private banking, asset management and investment banking) of the big banks. Due to regulatory requirements, the US business is overwhelmingly geared around local business.

Provision of services from Switzerland: The Swiss banks now only offer services to US private clients from Switzerland to a very limited extent. As a general rule, this business is only executed by standalone US-registered entities of the banks.

Volumes: According to independent estimates, North America – and particularly the USA – is enjoying the strongest asset growth of all the developed markets, and by 2015 will still to have the greatest share of global private assets, namely some USD 40 trillion.⁸ Due to regulatory requirements, this market potential for US clients (i.e. US taxpayers) has to be overwhelmingly targeted through local branches – for all business areas of the Swiss banks. With respect to

⁷ Source: SwissRe Sigma, data relates to 2012.

⁸ Source: OECD and national statistics, 2013.

banking and financial business with so-called US persons, Switzerland is on an equivalent footing with other countries, both in terms of local activity and cross-border business.

Insurance business

Local presence: Internationally active Swiss insurers only operate in the US market through their own subsidiary companies.

Provision of services from Switzerland: The cross-border business is essentially only possible in the area of reinsurance and to a certain extent in the area of industrial insurance. No subsidiary or branch is required in the USA for the reinsurance business. The US reinsurance market is therefore open to foreign reinsurers, although prudential hurdles make accessing this potential more expensive.

Volumes: In 2012, the premium volume of Swiss insurers in the USA amounted to CHF 40.1 billion. After the EU, the USA is the world's second-largest insurance market with a premium volume of more than USD 1,270 billion.⁹ A presence in this market is not only important because of the size of the US insurance market, it is also essential in the area of international industrial insurance due to the significance of the USA as the world's leading economy.

2.1.3 Growth markets (Central and Eastern Europe, Middle East, Asia, Latin America)

Banking business

Local presence: The physical presence of the banks in growth markets in the Asia-Pacific region is focused above all on Hong Kong and Singapore. The big banks have established booking centres here from where they serve not only the relevant local markets, but also for the most part the wider Asian region. Services are offered in all business areas via this local presence.

Provision of services from Switzerland: The provision of cross-border services by the Swiss banks in growth markets is mainly focused on Central and Eastern Europe, the Middle East, and Latin America. With respect to the importance and advantages of cross-border business, the same remarks apply as set out above for the markets of the EU/EEA area. The stable legal and political environment in Switzerland is an important factor for clients from growth markets.

Volumes: The growth of private assets is subject to significant regional differences, which will see an ongoing shift between the weighting of the developed markets (with a current total of USD 96 trillion of private assets) and that of the world's growth markets (current total of USD 53 trillion of private assets) by 2015. It is expected that the growth region Asia (excl. Japan) with assets of just under USD 35 trillion will catch up Western Europe by 2015 and thereby become the world's second-largest asset pool after the USA.¹⁰ Where the Swiss banks are concerned, the anticipated strong growth of Asia is attractive, but here they face stiff competition, above all from London and the financial centres of the Middle and Far East. Nonetheless, the banks see considerable potential in the Asian market. However, they service the Asian markets overwhelmingly through local representation in Singapore and Hong Kong, and not from Switzerland. Above-average annual growth rates are expected for Latin America, albeit from a low asset base.

⁹ Source: SwissRe Sigma, data relates to 2012.

¹⁰ Source: OECD and national statistics, 2013.

Insurance business

Local presence: The direct insurance business in the Asian region is conducted via a regional hub in Singapore and branch representation in Australia, Hong Kong and China, Indonesia, Japan and Malaysia. In Latin America, subsidiaries and branches operate in Argentina, Brazil, Chile, Mexico, Uruguay, and Venezuela.

Provision of services from Switzerland: The cross-border business is only possible in the area of reinsurance and to a certain extent in the area of industrial insurance.

Volumes: There is considerable growth potential in the growth markets of the Middle East, Asia and Latin America. Insurance penetration rates in these countries are typically very low, which is why it is believed there is a growing need for insurance services against the backdrop of a growing middle class. In 2012, the premium volume of Swiss insurers amounted to CHF 13.3 billion in the Asia-Pacific region and CHF 2.1 billion in other regions.¹¹

2.1.4 Outlook for selected other business areas

Asset Management

In the asset management area, the question of market access arises on the one hand indirectly with respect to the management of collective investment schemes or investment products, and on the other hand directly with respect to the activity of asset managers in the context of the institutional asset management business, including on behalf of pension funds and wealthy private clients. The asset management business for large companies and institutional clients domiciled outside Switzerland is already an important business area, with significant additional global potential thanks to the growth of pension and insurance markets. This is true not only of the cross-border business but also the business involving a local presence. In terms of volumes, asset management is enjoying positive growth in keeping with the regional trends that apply in the wealth management business. In 2015, North America and Western Europe are expected to be the leading regions, with USD 33 trillion and USD 16.6 trillion of assets under management respectively. Whereas annual growth of approx. 7 and 4% respectively is expected for these two established markets going forward, significantly stronger growth rates are assumed for the comparatively still low asset levels in growth markets such as Asia and Latin America (approx. 11% and 13% respectively).¹²

The importance of asset management needs to be considered beyond its value as a stand-alone business, however. The cross-border asset management business also has an important parallel function for the private client business in the product area, i.e. products are developed and managed in Switzerland and then offered and sold to foreign clients of the private client business. Large independent asset managers in particular can exploit this distribution opportunity. A particular role here is played by funds and alternative investments, areas in which Switzerland has a significant pool of expertise. A deterioration of market conditions in asset management may therefore have direct negative repercussions for the private client business.

In recent years, regulatory tendencies in the EU have emerged that make it difficult to manage European products, particularly funds, from Switzerland. Of particular relevance in this respect are the regulations issued as part of the Alternative Investment Fund Managers Directive

¹¹ Source: Swiss Insurance Association (SIA).

¹² Source: Coalition, Dealogic, Local Fund Associations, National Banking Associations, 2013.

(AIFMD).¹³ Due to the different degrees of implementation of the AIFMD in EU member states, a large number of national provisions – in addition to those directly applicable in Switzerland – have to be taken into account when managing alternative investment funds. The traditional client group of this business area is essentially made up of professional clients and eligible counterparties, which is why future market access will be covered by the regulations of MiFIR (cf. Section 2.2.1).

In the longer term, it is important for Switzerland as an asset management location that additional structures do not have to be built up abroad when these already exist in Switzerland. For providers from Switzerland that have to maintain operations in two or more locations, the impact of the corresponding market entry hurdles will be negative.

Investment banking

The investment banking activities of the Swiss banks are to a large extent pursued through a local presence, as the key markets for this activity (the US and the UK) are also the leading global centres for capital market transactions (New York and London). By contrast, regulatory market access obstacles are not a decisive factor here.

Where international capital market transactions are concerned, the investment banking business from Switzerland is important. This is particularly true of currency transactions (foreign exchange), in the fixed income and equities areas, and for clients who rely on a global booking model. As in the case of asset management, therefore, it is important to the international investment banking business in Switzerland that foreign regulations do not restrict the distribution or trading of these products. Restrictions of this kind may also have indirect repercussions for the international private client business.

Where the MiFID II/MiFIR market access regulations of the EU are concerned, it is essentially the latter that are of relevance to investment banking. We therefore refer the reader to the corresponding paragraphs in the asset management section above.

Financial market infrastructure

Switzerland's highly developed financial market structure provides it with an opportunity to position itself as one of the world's leading centres of activity and develop in new or growing areas.

In the business areas of securities trading, security services, financial information, and payment transactions, between 25 and 80% of all turnover is generated in the EU or with the EU clients (either locally or from Switzerland).¹⁴ It is conceivable that EU regulation will move in a direction that makes it more difficult for third country providers to access clients domiciled in the EU.¹⁵

¹³ Although a framework was created that essentially permits the management of alternative investments thanks to an MoU between FINMA and ESMA, a number of requirements that have arisen as a result of the AIFMD and national implementation of this directive nonetheless appear to be restricting this activity in practice.

¹⁴ Source: SIX.

¹⁵ The EU envisages trading obligations for securities houses domiciled in the EU. These may also be fulfilled by a trading function or trading system in a third country whose regulation and oversight is recognised as being equivalent.

In addition to its focus on the EU, SIX also has commercial relationships with other countries, primarily in Asia and the US.

Wealth management and non-banks

In an international comparison, there are many providers in the area of wealth management in Switzerland who do not hold bank status.¹⁶ Of these companies, which are overwhelmingly small companies or micro-businesses, more than 90% provide their services from Switzerland without a foreign branch. However, the great majority are still active in the business for foreign clients. Given their geographical proximity, clients domiciled in the EU/EEA are by far the most important foreign client segment. In this business area, they only provide asset advisory and management services for financial assets that are for the most part deposited with domestic banks. This is an area in which they compete with the banks (cf. Section 2.2.1).

2.2 Foreseeable changes in market access and repercussions

2.2.1 EU/EEA area

Banking business

The content of the overhauled EU MiFID directive¹⁷ (i.e. the revised version MiFID II) and the subordinate regulation MiFIR¹⁸ will be crucial in determining changes in market access for banks outside the EU/EEA area with respect to clients domiciled or resident in an EU/EEA member state.

The EU Commission originally wanted to issue a standardised set of regulations for the whole of the EU/EEA that would cover access for financial institutions from third countries with respect to the retail market / private clients. The third country regime envisaged with this in mind was very openly formulated, and ultimately could have been interpreted to mean that the provision of services from Switzerland (i.e. on a cross-border basis) would become much more difficult in the future. In mid-January 2014, representatives of the EU Council of Ministers and EU Parliament reached a compromise on the design of MiFID II following a so-called trilogue consultation process. The final version was confirmed by the European Parliament on 15 April 2014 and by the European Council on 13 May 2014. The new provisions will enter into force on 3 July 2014.

Following this development, it is now clear that there is essentially no change with respect to the active provision of financial services to retail customers,¹⁹ as the regulations that apply at national level of the corresponding country of domicile/residence will remain in force. It will continue to be left to individual EU member states to decide whether they want to make the active servicing of such clients by financial institutions from third countries dependent on a branch requirement or not. If they do insist on a branch, however, the harmonised MiFID II

¹⁶ Source: ZHAW; between 2,300 and 3,600 providers depending on the estimate.

¹⁷ Directive of the European Parliament and Council on Markets in Financial Instruments, repealing Directive 2004/39/EU of the European Parliament and Council.

¹⁸ Directive of the European Parliament and Council on Markets in Financial Instruments and as an amendment to the EMIR regulation on OTC derivatives, central counterparties, and trade repositories.

¹⁹ This term encompasses on the one hand natural persons, i.e. small investors and so-called *opt-up* or designated professional clients, and on the other non-regulated companies below the MiFID threshold levels (for designated professional clients).

regulations will apply in the future, without this allowing the whole of the EU/EEA area to be serviced from this branch (i.e. no EU passport).²⁰

MiFIR now envisages harmonised regulations for the provision of cross-border services by financial institutions from third countries to professional investors and eligible counterparties in the EU²¹. If the EU Commission recognises the regulation and supervision of a third country as equivalent to that of the EU, companies from these countries could serve professional clients and eligible counterparties throughout the EU (EU passport) without needing a branch in the EU following registration with the European Securities and Markets Authority. For third countries whose regulation and oversight are not considered to be equivalent by the EU Commission, the individual EU member state itself will continue to be able to determine access conditions.

In addition to these two market access regimes, the possibility of passive service marketing and provision is to be retained. This is significant, as the business of the Swiss banks currently involves a passive business model in many important EU/EEA countries. Depending on the design and interpretation of that provision, a restricted or enhanced opportunity to service existing clients will result in the future.²²

Insurance business

In the insurance area, developments surrounding the implementation of Solvency II should be closely observed in particular. Solvency II has the effect of intensifying the supervision of insurance groups. This comprises capital requirements, internal models, and all other elements of group supervision. It also includes complex questions surrounding the division of tasks, responsibilities and powers between the "home supervisor" and the supervisory authority in the corresponding EU member state ("host supervisor"). Regulatory developments of this kind have an impact on the competitive situation of Swiss insurance groups in the EU/EEA area.

2.2.2 USA

Banking business

Generally speaking, the USA is a very challenging market. The complexity of the regulatory requirements that have to be fulfilled, the number of authorities and agencies involved, and the level of competitive pressure are all high and likely to remain so. Moreover, there is a tendency in the US to restrict the responsibilities of domestic country supervision and regulation (for example, big banks in the US must establish a holding company that bundles all its US activities and requires separate capital underpinning, which makes business in the US more expensive for foreign banks).

²⁰ The finalised MiFID requirements include (a) appropriate regulation and oversight, as well as compliance with the FATF recommendations on money laundering and the financing of terror, (b) cooperation agreements between FINMA and the regulator of the country of the relevant bank branch, (c) sufficient capital, (d) the branch to be managed by persons who fulfil the MiFID requirements for board directors, (e) a bilateral agreement between Switzerland and the country of the relevant bank branch with respect to the exchange of information in accordance with Art. 26 OECD Model Tax Convention and (f) participation in an investor compensation system.

²¹ The term encompasses regulated companies and non-regulated large companies.

²² The relevant provision in MiFID will not be concretised further through an Implementation Regulation on the part of the EU Commission (regulation technical standards: "Level 2"). Accordingly, it may be assumed that greater clarity regarding the potential scope of passive service provision will not be forthcoming until the issuance of so-called implementing technical standards ("Level 3") by the ESMA, which can only be expected in the medium term.

Current negotiations between the US and the EU over a free trade agreement (Transatlantic Trade and Investment Partnership, TTIP) are also focusing in particular on non-tariff trade obstacles. Depending on whether (and how) the resulting outcome has the effect of harmonising regulatory requirements in the financial sector, repercussions for the Swiss banks are a clear possibility.

Insurance business

In the US, a number of developments in the area of tax law have called into question the equal treatment of foreign insurers when it comes to market access. One such development concerns the possible limiting of the tax deductibility of intragroup reinsurance premiums paid to non-US-domiciled parent companies. This would lead to the unequal treatment of Swiss insurers, as their intragroup reinsurance transactions would effectively be doubly taxed. In addition, there have been attempts to reverse the latest progress made in the reduction of the so-called US Reinsurance Collateral Requirement that applies to foreign reinsurers.

2.2.3 Growth markets (Central and Eastern Europe, Middle East, Asia, Latin America)

Banking business

Conditions for market access in the key growth markets could be subject to change as a result of the implementation of the automatic exchange of information in tax matters (AEI) as a global standard by the G20, with potentially significant differences from country to country. In this context it is conceivable that states with significant market potential would be prepared to enter into negotiations with Switzerland on removing potential obstacles to market access.

Insurance business

In a number of emerging markets, particularly in Latin America, there have been increasing signs of protectionist tendencies in the insurance area over the last few years. For Switzerland as a centre of insurance, it is essential that risks can be centrally bundled (pooled) through intragroup reinsurance transactions. Risk pooling is one of the principal economic functions of insurance, and only through the mechanism of global risk pooling can this function be fulfilled to the benefit of clients. Moreover, many emerging markets are not in a position to carry catastrophe risks on a purely national basis due to the undeveloped nature of their financial markets.

2.3 Summary of situation analysis

The key points in the above assessment of the market situation and anticipated developments in the regulatory environment that are likely to be relevant to market access for the financial industry may be summarised as follows.

Banking business

The priority of the banks with respect to the preservation or improvement of market access lies in the cross-border provision of services in all business areas (private banking, asset management, corporate client business/investment banking). More than a half of assets managed in Switzerland belong to clients domiciled or resident outside Switzerland. When it comes to managing and preserving the value of these assets, the spectrum of services and

products offered from Switzerland will continue to be crucial, and the same applies to the acquisition of new assets. The ability of the banks to bundle the services they provide to a number of different foreign markets from Switzerland allows them to exploit synergy effects, which in turn can lead to important cost advantages and preserve both jobs and expertise in Switzerland. Switzerland's generally advanced regulatory environment can also be utilised in this context to a certain extent.

Access to foreign markets makes it possible to preserve the value creation contribution made by the cross-border asset management industry. Of the global total of approx. USD 8,500 billion of assets managed on a cross-border basis on behalf of wealthy private clients (category criterion: freely disposable net assets of more than USD 1 mn), the Swiss financial centre has an estimated share of 26% or USD 2,200 billion.²³

It should be borne in mind that transactions with foreign clients executed on a cross-border basis on the one hand, and via a local presence on the other, frequently address different client needs and are therefore not mutually exclusive, but complementary. In addition to often focusing on different client needs to those of the cross-border business, local market coverage provides Swiss banks with different strategic options. By contrast, the cross-border services offered the Swiss banks are particularly attractive to clients looking for geographic diversification of their asset base (whereby Switzerland's stable political environment is often crucial to clients from growth markets in particular), or to clients who are dependent on specific Swiss capital market transactions (in CHF).

In the leading financial centres, the big banks at least are also represented locally in all business areas. The importance of business with a local commercial presence is overwhelmingly decided by banks on a country-by-country basis (rather than a regional basis), and is heavily dependent on a bank's business strategy. The same conditions that apply abroad to Swiss banks operating locally are typically the same as those for domestic banks, and discriminating market access restrictions are generally not found.

A key focus of the banks is the EU/EEA area. Securing market access in this region is considered a challenge that should be tackled as a priority from a temporal perspective. This region is attractive for the cross-border private client business as a result of its size and geographic proximity, despite lower growth dynamism and indications of saturation. With respect to the business with professional clients in the EU, the harmonisation of EU regulation under MiFIR should be viewed as an opportunity to continue to be able to serve clients in this segment throughout the EU/EEA area thanks to the attainment of equivalency recognition.

High market growth rates and significant revenue potential explain the equally great interest of the Swiss banks in the cross-border business in the growth markets of Central and Eastern Europe, the Middle East, and Latin America – despite the fact that the volumes in these markets are still comparatively small in all three business areas. In the US and Asia, the banks are tapping into substantial business potential for the most part through a local commercial presence, or – in the case of individual Asian markets – through cross-border business from a regional hub (as is the case already for the servicing of China from Singapore and Hong Kong).

Insurance business

Insurers consider the provision of services through a local presence to be crucial in all business areas (indemnity insurance, reinsurance, life insurance), as business activity without this kind

²³ Source: Swiss Bankers Association (SBA), "Wealth management – at a global level and in Switzerland: status report and sector trends", November 2013.

of local presence is often not permitted. Only in the reinsurance business, and to a certain extent in the area of industrial insurance, is it possible to provide any services from Switzerland to other countries.

Preserving market access abroad is crucial if the contribution made by insurers to value creation is to be maintained. More than two thirds of premium income is generated abroad. In the life insurance area this proportion amounts to some 56%, in the property insurance business just under 60%, and in the reinsurance business more than 95%.²⁴

For insurers, access to the EU/EEA area through a local commercial presence is the overriding priority in all three business areas. Europe is the world's largest insurance market, and is still considered to have significant growth potential.

Insurers gear their activities around the regulatory parameters that apply in their respective target markets, although this now involves increasing complexity and costs. Recognition of the equivalency of Swiss regulation and oversight with EU law by the EU Commission is vital if regulatory disadvantages (e.g. in the case of capital requirements) and multiple oversight (e.g. in the event of EU-wide subgroup oversight for insurance groups from third countries) are to be avoided.

The industry advocates an updating of the existing insurance agreement with the EU of 1989 on a purely technical level, without any expansion of its scope. The long-term goal, with a view to preserving uniform competitive conditions, must be non-discriminatory access to the European domestic market for financial services.

As the world's second-largest insurance market, the US is also a major priority for insurers in the areas of indemnity insurance and reinsurance, and continued market access here is of particular importance. Here too, market positions can be secured through a local presence. In the world's growth markets, insurers are highly active on a cross-border basis in the reinsurance business in particular. The goal of market access in key non-European growth markets should be pursued relentlessly.

Asset management

Asset managers emphasise the necessity of achieving unrestricted access to institutional asset management markets abroad, particularly in the rapidly growing insurance and pensions business. In addition to supervisory and tax aspects, market access obstacles include in particular having to build up costly additional structures abroad when the equivalent structures already exist in Switzerland. With respect to Switzerland as an investment fund location, market participants stress the point that the Swiss system of withholding tax represents a competitive disadvantage in the sale of Swiss funds abroad.

Financial market infrastructure

For transactions involving financial market infrastructure, the EU/EEA area remains the most important region for both turnover and profits, whereby this applies to both the cross-border business and local business. Preserving market access in this region is very much a priority for financial infrastructure providers.

Wealth management and non-banks

²⁴ Source: Swiss Insurance Association (SIA), data relates to 2012.

For wealth managers without bank status, the importance of being able to market services actively abroad depends on the type of institution. Whereas large providers are interested in securing market access, the predominant business model of the majority of small providers is purely passive business with a stable client base from the EU/EEA area, a situation that is unlikely to change in the future. For niche players specialising in East European and non-European markets, cross-border access to these markets from Switzerland is of particular importance.

Section 3: POTENTIAL AREAS OF ACTION FOR SWITZERLAND

The situation analysis conducted in the previous section acts as the starting point for the following areas of action for Switzerland set out below. The aim of state involvement is to facilitate the preservation of jobs and value creation in Switzerland through optimisation of the relevant parameters, including the aspect of foreign market access.

With respect to the existing opportunities for action vis-à-vis the EU or individual EU member states, a relevant factor to be taken into consideration is the Swiss electorate's approval (on 9 February 2014) of the "Against Mass Immigration" popular initiative, according to which immigration is to be subject to maximum ceilings and quotas in the future. These will also affect EU citizens. In addition, the initiative envisages introduction of the principle of priority for Swiss nationals. The Federal Council and parliament must enact the new constitutional provision into law within three years. Furthermore, the Federal Council has been given a mandate to amend the Free Movement of Persons Agreement in negotiations with the EU, in order to reconcile the terms of this agreement with the new constitutional provision. The following areas of action are based on the crucial assumption that a solution can be found with the EU that allows Switzerland to continue on the bilateral path with the EU on the basis of existing contractual relations.

The following section describing the relevant background (Section 3.1) sets out the Federal Council's current financial market policy. The areas of action 1 to 4 contain possible additional steps to improve market access in the EU/EU area and other key markets for the Swiss financial industry. The legal, institutional, and economic aspects of these areas of action are commented on in summary form. The following areas of action complement one another, which makes a parallel approach feasible.

Even if these areas of action are limited to possible state measures, it should be emphasised that the state should do no more than secure reliable regulatory and tax parameters for the financial centre, which includes achieving protection objectives under supervisory law. The Swiss political establishment and authorities should design parameters in such a way that the financial industry based in Switzerland can seize opportunities arising from national and international market developments. Responsibility for exploiting the available freedom of manoeuvre and ensuring value and job creation lies with the private sector alone.

3.1 Basis: existing financial market policy

A basic underlying assumption is that Switzerland will continue its existing financial market policy without change.²⁵

Swiss-EU relations

From an institutional standpoint, the prerequisites for a continuation of the existing strategy are in place, as Switzerland can preserve market access not through any bilateral agreement with the EU, but where necessary through its fulfilment of market access requirements laid down unilaterally by the EU in certain items of legislation, including the need to ensure equivalent regulation and oversight. As a result, participation in the EU's internal financial market is in

²⁵ The Federal Council first set out its financial market policy in December 2009, in the report "Strategic directions for Switzerland's financial market policy". In December 2012 it then developed this policy further in its "Report on Switzerland's financial market policy".

principle partially possible without any bilateral foundation. However, even the fulfilment of all market access requirements for non-EU states will not guarantee that market access will be granted in the future to the same degree that applies today. In view of the continuous further development of financial market regulation in the EU, a more restrictive structuring of EU market access requirements cannot be ruled out (cf. excursus on the equivalency principle).

The equivalency of regulation and oversight is often a requirement for market access for third country providers under EU law nowadays. In order to achieve this equivalency, it may suffice for Swiss regulation to be adjusted on a point-by-point basis, but it is equally possible that further-reaching regulatory reform measures will be required. As part of the revision of the MiFID guideline, a distinction was made between business with private clients and professional clients with significant repercussions for Switzerland's need to make regulatory adjustments. Whereas an equivalency review by the EU Commission of the regulation and oversight of a third country with respect to professional clients may facilitate access to these clients, even an realignment of Swiss legislation for the segment of private clients (including *opt-up* professional client) will not make it any easier to access this market (cf. section 2.2.1).

Due to the trend towards harmonisation of EU market access rules for third country providers, questions of financial market access are increasingly becoming a focal point in overall relations between Switzerland and the EU. Among other things, this is not least because it is the EU Commission (rather than the European Supervisory Authorities) that makes the decision on the equivalency of financial market regulation and oversight put in place by third countries.

Switzerland is seeking to negotiate bilateral agreements with selected EU partner countries with a view to facilitating market access for Swiss financial service providers. This is typically undertaken in the context of overall bilateral discussions, which includes tax aspects, with the corresponding country. A standalone agreement to improve market access is already in place with Germany. By contrast, market access agreements were concluded as part of withholding tax agreements with Austria and the United Kingdom.

Swiss relations with other countries

Switzerland campaigns actively (i.e. through financial dialogues²⁶ as well as via official forms of intervention) against the raising of market access barriers abroad. As part of the WTO's General Agreement on Trade in Services (GATS) and separate free trade agreements (FTAs), Switzerland also negotiates on legally binding obligations to improve the conditions of market access for Swiss market participants, including financial institutions. These negotiations include discussions on reducing discrimination, as well as measures in the area of quantitative restrictions and requirements of legal form for companies, but do not touch on supervisory measures.

At the same time, Switzerland participates actively in the development of global standards with a view to achieving an international alignment of standards in key areas (level playing field) and flagging up specific national interests. Standards recognised by the international community of states and by competing financial centres in particular should as a rule be

²⁶ The aim of financial dialogues is to improve collaboration between the relevant partner authorities in finance and tax matters. The State Secretariat for International Financial Matters (SIF) has so far concluded MoUs as a platform for regular consultation in the financial area with the following partner countries: Russia (September 2011), India (October 2011), Australia (April 2012), Brazil (May 2012), Turkey (October 2012) and China (May 2013). In addition, the SIF maintains an annual regulatory dialogue with the EU Commission (Directorate-General for Internal Market and Services).

implemented by Switzerland too. In the event of such standards are not being adopted, justifiable alternatives should be put forward.

WTO/GATS and free trade agreements

Various questions of market access in the area of financial services are addressed in the framework of the General Agreement on Trade in Services (GATS). Commitments in this area encompass financial activities and the four modes of service supply ²⁷ in keeping with members' Schedules of Specific Commitments. The majority of WTO members have made legally binding commitments in the area, but these commitments are limited, particularly where the provision of cross-border services is concerned. The GATS envisages successive negotiations taking place with a view to increasing the level of liberalisation, and possible improvements can be envisaged in the area of financial services in the long term. However, the approach adopted by the GATS does not concern the creation of a regime similar to a single market (based on recognition, equivalency, and/or cooperation).

Given the status of current negotiations (Doha cycle), around 20 countries interested in greater liberalisation of trade in services, including financial services, have embarked on negotiations for a multilateral agreement in this area (Trade in Services Agreement, TiSA). This agreement will include the relevant provisions of the GATS. Just like the latter, TiSA does not envisage a regime similar to a single market. Switzerland is participating in keeping with its trade policy. The EU and the US are the main protagonists in this project. However, there is no reason to expect significant improvements for market access in the area of financial services.

As part of its trade policy, Switzerland conducts negotiations on broad-based free trade agreements, which in addition to trade in goods also covers trade in services, including financial services. The latter constitute a priority for Switzerland. Switzerland is seeking to improve commitments in the area of national treatment, quantitative restrictions, and legal form requirements for companies, as well as the various rules relating to the GATS (e.g. transparency, procedures relating to authorisation, regulations covering prudential measures). In this context Switzerland is also seeking to avoid discrimination relative to its key trade competitors. Just like the GATS and the TiSA, these free trade agreements do not attempt to recreate a single market.

Excursus: The equivalency approach in relations with the EU

The recognition of the equivalency of a foreign country's regulatory and supervisory framework is applied in the international context as a way of avoiding duplication or legal contradictions. In international discussions, there is no single generally accepted equivalency concept. This notion, which was originally discussed in the context of EU/US relations, has now been adopted by the EU as a fixed element in harmonised third country regimes under EU regulation. Existing EU regulations – or at least the versions of regulations that are still at the draft stage – that address so-called third country regimes can be found in a number of different sectors. These have the effect of standardising market access prerequisites outside the EEA and therefore regulating these in a binding way for all EU member states. Depending on the specific formulation of provisions, market access for financial service providers from third countries is coupled to the following requirements, among others:

- Equivalency of third country regulations with EU regulations
- Conclusion of a cooperation agreement between the supervisory authorities involved (at

²⁷ The four modes are as follows: (1) cross-border supply; (2) consumption abroad; (3) commercial presence; and (4) presence of natural persons.

national and EU level), including the exchange of information.

For Switzerland, the advantage of the equivalency approach adopted by the EU lies in the formulation of standardised market access provisions for third countries. This should have the effect of overcoming the still very fragmented national market access guidelines of individual EU member states, leading to the establishment of identical competitive conditions for all foreign financial service providers operating in the EU/EEA area. The equivalency approach represents a flexible instrument for achieving the desired market access in several sectors – as long as the regulatory need is recognised at a sufficiently early stage. Obstacles and delays can emerge as a result of the different levels of the Swiss legislative process and the complexity of the regulation material, as well within the framework of the recognition process itself.

The scope of an equivalency review can vary hugely depending on the regulatory project, and there is no standardised and clear definition of the equivalency yardstick. Depending on the regulatory project, this may range from a legal alignment that is true to the letter at one extreme, to a more result-oriented approach at the other. From the viewpoint of the affected third countries, this absence of clarity can result in potentially significant legal uncertainties. To this extent, even if Switzerland pursues an equivalency approach, it cannot be sure of actually gaining market access, as the EU Commission ultimately decides unilaterally whether Swiss financial market regulation and oversight is equivalent or not.²⁸ This unilateral recognition procedure creates a situation in which Switzerland has a relationship of dependency on the EU. Moreover, even if equivalency is acknowledged, this may still not result in authorisation throughout the EU (i.e. an EU passport) in all areas.²⁹ A further drawback is that the equivalency requirement may not necessarily represent the only obstacle to market access in the context of third country regimes. An example of this would be the requirement to set up a local branch, as was originally envisaged in the revision of MiFID.

Equivalency is not a magic point, which once reached is secure for evermore. When it comes to the equivalency principle, Switzerland may retain autonomy of action in the decision as to whether it wishes to align Swiss legislation with the EU equivalent. But it has no real influence on how EU regulation will be shaped. The degree to which Switzerland could exercise some influence on the EU's financial market regulations in connection with third country regimes is very hazy, and should be assessed as very limited indeed.

3.2 Area of action 1: Market access agreements with EU member states

3.2.1 Legal and institutional aspects

This area of action takes account of the fact that access to the EU financial market on a par with the access enjoyed by EU countries themselves essentially requires international agreements to be reached. Where third countries are concerned, individual EU member states are free to conclude such agreements as long as the EU has not assumed exclusive responsibility in this area.

In mid-January 2014, representatives of the Council of Ministers and the EU Parliament agreed on an overall compromise for the MiFID revision following a trilogue process. This was then approved by Parliament and the EU Council before entering into force on 3 July 2014 (cf. Section 2.2.1). This decision should permit Switzerland to reach (or extend) agreements on

²⁸ The European Supervisory Authorities (ESAs) play an important advisory role in this context.

²⁹ Under the passport system, market participants from a third country who fulfil all regulatory requirements have a right to operate in all EU/EEA countries as long as they provide notification. They do not have to fulfil any further material requirements.

regulated financial market access with individual EU member states within the framework of MiFID II, particularly with respect to the private client business.

EU member states may only conclude bilateral agreements with third countries within the framework of existing EU law. The EU Commission may review these agreements for their compatibility with European law, possibly request changes, and in the event of non-compliance initiate breach of contract proceedings against the EU member state in question. This also applies in the event of new EU legislation contradicting existing agreements of an EU member state with a third country. In such a scenario, the EU member state in question must either amend the agreement to bring it into harmony with EU law or announce its termination.

WTO/GATS

Agreements in the context of the directive MiFID II would be achievable under the GATS article that covers recognition (Article VII).³⁰ The approach would involve negotiating agreements on the mutual recognition of standards and prudential measures covering the area of application of MiFID II with interested EU member states. Such agreements would improve conditions of market access and reduce discriminatory treatment to a minimum through the harmonisation and mutual recognition of the pertinent regulations and supervisory principles. Authorised institutions subject to supervision in their own jurisdiction would be able to offer and provide their services on the territory of the other party (on a cross-border basis or through a commercial presence).

Oversight

With respect to EU member states that are not introducing a branch requirement under MiFID II, the national market entry prerequisites that apply to the private client business today should continue to be adhered to. Under existing legislation, liberal access opportunities only exist in a few exceptional cases. Measures to facilitate market access are only possible at the supervisory authority level if national supervisory law provides the potential for such measures, failing which legislative adjustments or bilateral solutions will be required.

Moreover, against the background of a general trend towards strengthening investor and consumer protection, it cannot be ruled out that individual EU member states could design market access requirements below the threshold of a branch requirement more restrictively (e.g. direct application of EU supervisory law or local law following implementation of EU requirements), or make market access completely impossible.

³⁰ One of the cornerstones of the GATS is the "most favoured nation" clause (Article II GATS). Preferential agreements on mutual recognition of standards or criteria (in particular the provisions on qualifications and authorisation) and supervisory measures are not covered by this clause, because they do not constitute a means of discrimination between countries or a disguised restriction on trade (Article VII GATS). Also not covered by this clause are bilateral or multilateral preferential agreements, provided that such agreements cover a substantial number of sectors and services and envisage the absence or the elimination of virtually all forms of discrimination between the parties (Article VII GATS). This last-named exception may not be invoked for agreements limited to the financial sector. Moreover, measures that are incompatible with the most-favoured-nation clause and expressly listed by a WTO member are exempted from obligations deriving from Article II of the GATS (Annex on Exemptions with respect to Article II GATS).

3.2.2 Economic aspects

Value creation and costs

"Area of action 1" allows Switzerland to pursue an active approach with respect to those countries in which a positive impact on value creation and job creation can be expected. The main determinant of the extent of these positive repercussions is likely to be the market volume that Swiss financial institutions would be able to access in the respective partner country, and the material depth of the corresponding bilateral agreement.

The implementation costs that a market access agreement is likely to entail for financial institutions and the state depend heavily on the country-specific regulatory framework and the relevant supervisory requirements. The costs incurred in concluding individual bilateral agreements could be mitigated by economies of scale, as long as the respective requirements are similar (e.g. where compliance with harmonised EU law is required). Costs for the state are above all likely to be incurred in the intensification of negotiations with individual EU member states on the most comprehensive degree of market access possible. It is likely that agreements of this kind would have to be individually structured.

Legal security

As EU member states may also have to review their own third country regulations as part of the implementation of MiFID II, an active approach to key partner countries could counteract the risk of market access requirements becoming more rigorous in national legislation. A bilaterally established, clear set of rules regarding market access would increase legal security for the private sector. In particular, this would also make it possible to reduce the legal and reputation risks that exist in the cross-border financial services business. In view of the trend towards harmonisation of market access rules in EU financial market regulations, however, there is a risk that bilateral agreements with individual EU member states would be affected, and would either become invalid or at least need to be amended; to this extent, a bilateral agreement may not guarantee a third country absolute legal security.

3.3 Area of action 2: Financial services agreement with the EU

3.3.1 Legal and institutional aspects

This area of action focuses on an international agreement between Switzerland and the EU to improve market access that would be restricted to the financial sphere. This sectoral financial services agreement (FSA) would cover both freedom of establishment (discrimination-free establishment of local branches) and the provision of services (cross-border service provision). Part of the negotiations over an FSA is likely to be dedicated to the issue of how far Switzerland would have to adopt the financial sector EU "acquis" (regulation of banks, financial conglomerates, insurers, etc) and possibly also parts of horizontal, cross-sector EU legislation (e.g. provisions regarding competition). The adoption of the relevant acquis would take place dynamically, i.e. Switzerland would implement the corresponding developments in EU legislation while at the same time preserving its own national legislative process. With such an agreement and the adoption of the corresponding acquis, Switzerland would achieve level

pegging with EEA countries with respect to market access, and would no longer be considered a third country where the corresponding guidelines are concerned.³¹

An FSA would need to be preceded by an agreement on institutional questions, whereby the FSA would align itself with the key aspects of such an agreement – the dynamic adoption of legislation, the recognition of ECJ case law, the resolution of disputes with the involvement of the ECJ, and Switzerland's participation in the decision-making process for new EU legislative acts. Negotiations with the EU on an institutional agreement began in May 2014. However, following the acceptance of the popular initiative "Against Mass Immigration" by the Swiss electorate on 9 February 2014, the resumption of the bilateral path that formed the objective of these negotiations is now likely to depend on a solution being reached between Switzerland and the EU on the Free Movement of Persons Agreement.

An FSA would involve substantial adjustments to Swiss law as per the EU *acquis*. Questions of a legal and economic nature with respect to the multifaceted repercussions of an FSA cannot be conclusively answered from today's standpoint, and require further in-depth analysis. The outcome of an evaluation of the consequences of an FSA would depend heavily on whether – as part of negotiations on certain areas – exceptions could be made, and to what degree Switzerland would be asked to adopt elements of the EU's horizontal *acquis*, as well as possibly other associated measures. The negotiation and ratification of such an agreement could take up several years, which makes an FSA (at best) an instrument to secure EU market access in the medium term.

WTO/GATS

A financial services agreement would be achievable under the GATS article that covers recognition (Article VII), whereby the approach would involve negotiating a sectoral agreement with the EU on mutual recognition of standards and prudential measures covering all financial services.

The conditions of market access would be facilitated by the principle of recognition, including the harmonisation of the relevant regulations and supervisory principles (conditions similar or equivalent to a single market). Authorised institutions subject to supervision in their own jurisdiction would be able to offer and provide their services on the territory of all parties (on a cross-border basis or through a local commercial presence).

Oversight

Any requirement for the Swiss supervisory authorities to become involved in the European System of Financial Supervision (ESFS) could have far-reaching consequences for the oversight approach pursued today. Oversight at EU level was strengthened significantly in the wake of the global financial crisis. Among other things, this would mean a switch from principle-based regulation – as practiced in Switzerland – to the rule-based regulation that holds sway in the EU.

³¹ With respect to the freedom to provide financial services, a sectoral (financial) services agreement would be equivalent in its effect to Switzerland actually joining the EU or EEA if it involved the adoption of the relevant EU *acquis*. Accession to the EU/EEA is therefore not taken into consideration as a possible area of action in this report. In its report of 17 September 2010 on the evaluation of Switzerland's policy on the EU, which was drawn up in response to the postulate submitted by National Councillor Christa Markwalder (09.3560), the Federal Council recently argued against Switzerland joining EU.

In the area of occupational benefits, the solvency requirements for extra-mandatory pension schemes in particular would have to be redesigned. This in turn would require the introduction of new forms of oversight and wide-ranging adjustments to regulation, with the corresponding cost consequences (administration, opportunity costs).

3.3.2 Economic aspects

Value creation and costs

The repercussions of an FSA for the Swiss economy – not just the Swiss financial centre – need to be analysed in more detail. The adoption of the EU acquis that would be entailed by an FSA could give rise to direct or indirect costs not just for the financial sector but also for other sectors and areas (e.g. non-financial companies, the public sector, occupational benefits, the Swiss population), which would need to be weighed against the overall benefits of such an agreement.

This potentially serious reservation and the need for more in-depth analysis notwithstanding, it does appear plausible that an FSA would have positive long-term repercussions with respect to the preservation of value creation and jobs in the Swiss financial centre. Described here as "Area of action 2", an FSA would offer Swiss providers comprehensive access to the EU financial services market. Not only would this fundamentally improve access to the entire EU in a lasting way, it would also provide valuable legal security with respect to this huge market. For the full benefits of market access to be enjoyed, Swiss financial institutions would have to continue to hold their competitive appeal. Furthermore, the financial centre will have to continue to differentiate itself through its stable economic and political environment, keeping Switzerland attractive as a target country for diversification investments.

Legal security

An FSA would bring legal security for the financial sector vis-à-vis the EU, which could not be achieved in the same way by concluding bilateral agreements with individual countries. Moreover, in certain areas the EU regulations are considered finalised, so that national requirements that go beyond these regulations are only possible within specific limits. By contrast, in certain areas where the application of EU regulations is unclear even within the EU itself, there would be rather less legal clarity and security. An example of this would be specific questions about cross-border activity in the area of occupational benefits (applicability of the regulation of the country of domicile or country of activity).

3.4 Area of action 3: Global orientation – bilateral

3.4.1 Legal and institutional aspects

In order to improve or facilitate market access for Swiss financial institutions not only in the EU/EEA area, but also globally, Switzerland could pursue a policy of negotiating concerns over market access obstacles on a bilateral basis with selected partner states. The priority should be standalone market access agreements with those partner states that have potential for Swiss financial service providers and/or that have an important financial centre. As a rule, bilateral market access agreements of this kind are implemented through the conclusion of separate implementation provisions in the form of MoUs with the corresponding financial market supervisory authorities. It may be possible to achieve selective improvements in market access as part of existing or new free trade agreements.

In a number of countries, it is already possible for Swiss market participants to provide cross-border services on the basis of a cross-border license, or on the basis of an approved exception (e.g. for cross-border investment advisory business in the US through the status of an "Investment Adviser"). The permissible activity under such licences differs greatly from country to country. In many countries the applicable guidelines only relate to security services for certain client segments, whereas in other countries the area of application is very much wider.³² Where there is sufficient interest on the part of Swiss financial market participants, analysis needs to be undertaken on a country-by-country basis to establish what opportunities exist, and what further measures (e.g. an expansion of the area of application) should be strived for in order to improve the prerequisites for doing financial business in the target countries.

WTO/GATS

MoUs would be achievable on the GATS article dealing with the issue of recognition (Article VII).

Oversight

Generally speaking, supervisory authorities play a rather subordinated role in the negotiation of free trade agreements. In order to achieve effective market access improvements, it would also appear crucial for negotiation of free trade agreements to be coupled to recognition of regulation and oversight, so that non-tariff-based obstacles and restrictions can be removed.

3.4.2 Economic aspects

Value creation and costs

"Area of action 3" allows Switzerland to enter into market access discussions in a targeted way with countries whose markets are of significance to the financial industry. Bilateral agreements with non-EEA countries would appear to be a logical way of enabling the Swiss financial centre to diversify its business. Furthermore, the negotiating mandate for market access can be determined in a country-specific way. This flexibility will make it possible to address economically important market access obstacles in a targeted manner. That said, the complexity and expense of implementing this kind of country-specific agreement should not be underestimated.

Just like bilateral agreements with selected EU countries (see "Area of action 1"), agreements with non-EU countries also entail costs for financial institutions and the state. Economies of scale are likely to be less easy to achieve than in the harmonised EU/EEA area due to the very different background situations. On the one hand, these costs manifest themselves in the form of high implementation costs for financial institutions, while on the other customised agreements of this kind also present significant challenges for government departments, and give rise to the corresponding costs. The extent of the likely implementation costs depends on the models being pursued for market access (e.g. on a selective point-by-point basis for individual activities or involving a comprehensive scope) and the relevant supervisory requirements.

³² Such national licences or approved exceptions are typically dependent on various conditions being fulfilled in the following areas (list is not exhaustive): (a) consumer and investor protection, (b) requirements for the supervision of companies and (c) the exchange of information between regulators.

Legal security

Bilateral agreements have the effect of increasing legal security for financial institutions. In the long term, however, there is a risk that the continuation of such agreements could be called into question, as in the event of Switzerland and the EU concluding a financial services agreement, this would in all probability also have repercussions for Switzerland's external relationships with non-EU countries.

3.5 Area of action 4: Global orientation – multilateral

3.5.1 Legal and institutional aspects

Switzerland has been stepping up its participation in the development of global standards with a view to achieving international alignment of standards in the area of market access (level playing field) and flagging up specific national interests. Where "Area of action 4" is concerned, these endeavours have been intensified further, as a comprehensive revision of the regulatory framework was initiated at international level through various multilateral bodies (e.g. G20, FSB) in the wake of the financial crisis. Implementation of these initiatives is ongoing. In addition to an increase in the level of regulation more or less "across the board" and an increase in supervisory intensity, activities and institutions that were not previously covered by the scope of regulation are now being drawn into it.

As a result of inconsistent implementation of international regulatory agendas at national level, a number of (potentially) significant regulatory duplications and supervisory differences have arisen. This obstructs cross-border business activity and can also pose an obstacle to market access. This effect has been exacerbated by the fact that certain jurisdictions – such as the US and the EU – have been trying to extend the geographical scope of application of their own regulations, including the subjection of foreign market participants to their oversight. This development has potential repercussions for local financial markets, and reflects the desire of individual legislators and supervisory authorities to tackle risks in their domestic financial markets with autonomous measures in cases of doubt. A good example in this context are measures to ensure sufficiently robust capital bases locally in crisis situations (national ringfencing in various forms).

Oversight

The Swiss authorities contribute actively to the relevant international bodies (FSB, BCBS, IAIS, IOSCO, etc.), with a view to promoting objectively convincing international standards and their consistent implementation. Standards should be sufficiently specific to avoid large differences from appearing in national regulation (level playing field and operational simplification of compliance); at the same time, standards must contain sufficient flexibility to allow for a differentiation of the Swiss regulatory approach, so that the specific features of the Swiss financial centre can be taken into consideration.

In order to limit the extraterritorial regulatory and oversight claims of foreign supervisory bodies to the greatest degree possible, Swiss financial market regulation must be internationally recognised, and Swiss financial market supervision must be respected as being conducted by an authority that is independent, professional, and effective while at the same time having sufficient freedom to cooperate.

3.5.2 Economic aspects

Value creation and costs

Multilateral processes in international institutions and forums in the financial market regulation area only touch on market access questions directly in exceptional cases. Indirectly, however, the strengthening of global financial stability and the design of globally recognised rules and standards that enable the Swiss financial centre to compete on level terms internationally has a positive impact on the Swiss financial centre, and can (again indirectly) have a positive impact on value creation. The costs for financial institutions in this area of action may be viewed as limited. The state by contrast faces higher costs, above all in the form of higher personnel expenditure, as a result of its increased activity in multilateral bodies.

Legal security

"Area of action 4" increases the opportunities for greater congruency of internationally applicable regulations, which is likely to contribute to greater legal security in the longer term.

3.6 Areas of action: summary

Switzerland's areas of action with respect to the objective of preserving and improving market access may be summarised as follows:

The preservation and further facilitation of market access is a priority challenge for Swiss financial market policy, and one that demands active efforts to shape relationships with the EU and partner countries around the world. If solutions to the above-mentioned questions and dialogues with partner countries and the EU are not actively sought, it is likely that the ability of Swiss financial institutions to access key markets will deteriorate. Additional measures to existing financial market policy on the part of the Swiss authorities are therefore called for with a view to preserving market opportunities for the Swiss financial centre in the international competitive environment.

As a potential measure in the areas of action 1 and 3, bilateral agreements with key partner countries can be sought, whereby priority should be accorded to the European countries with the greatest significance for financial business operated from Switzerland. However, there is also growth potential for the Swiss financial centre in emerging markets, and this potential too could be exploited through bilateral agreements. In view of the trend for greater protection of domestic markets, agreements of this kind are not likely to be easy to achieve. Coupling such negotiations with other open financial issues – such as in the tax area, for example – with the corresponding countries could increase the likelihood of making progress in this area.

"Area of action 2" is likely to have the potential to deliver the most sustainable impact for the financial sector in the form of comprehensive market access to the EU/EEA area, as well as increased legal security for internationally active financial service providers. However, the anticipated repercussions for numerous other areas of the Swiss economy need to be taken into account in any assessment of the value creation potential of this field of action. In-depth investigations could provide a further basis for an overall evaluation in this respect. However, the political hurdles for regulatory regime change involving greater adoption by Switzerland of EU legislation are substantial, not least since any alignment with the horizontal policies of the EU would also affect other areas of the economy.

The objective of achieving a multilateral facilitation of market access as per "area of action 4" represents a parallel measure to the other areas of action. However, this opportunity for action also involves the desired intensification of Switzerland's involvement in the international standard-setting process, something that is already feasible from today's standpoint.

Appendix: Members of the "Market Access" Subgroup

Co-chairs of the subgroup

- Jacques de Watteville, Secretary of State, State Secretariat for International Financial Matters (SIF)
- Patrick Odier, Chairman of the Swiss Bankers Association (SBA)

FSIO (Federal Social Insurance Office)

- Claudina Mascetta, Head of International Organisations

FDFA (Federal Department of Foreign Affairs)

- Dominique Paravicini, Deputy Director, Directorate for European Affairs (DEA)

FINMA

- Rupert Schaefer, Head of International Activities

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- Stefan Hoffmann, Head of Europe

SECO (State Secretariat for Economic Affairs)

- Eric Scheidegger, Deputy Director

SFAMA (Swiss Funds & Asset Management Association)

- Markus Fuchs, Managing Director

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- René Weber, Head of the Markets Division

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- Sandra Hedinger / Selma Frasa-Odok, Co-Heads of Public and Regulatory Affairs

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- Christian Stiefel, Director

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- Steve Hottiger, Head of Group Governmental Affairs

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- Susan Emmenegger, Professor

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Zurich Insurance Group

- Benno Keller, Head of Research and Policy Development

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- Aline Jörg, Economist, Sektion Financial Market Analysis Section
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