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ARTICLE

Third-Country Regime and Equivalence: The Swiss Perspective

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Abstract
This paper discusses the role of the third-country regime and equivalence from the Swiss perspective. It provides an analysis of the evolution of the Swiss approach. The various reactions to EU developments have ranged from the attempt to implement a reciprocity principle, to the resort to unilateral recognition. An overarching purpose of the Swiss equivalence framework has consisted of the relentless pursuit of a competitiveness objective. Yet the decline of equivalence as a market access mechanism has led to favouring other market access routes. This paper concludes that the recent reforms have initiated a roadmap towards an increasing autonomy of Swiss financial market law.

Keywords Equivalence · Extraterritoriality · Inbound cross-border financial services · Swiss financial market law · Reciprocity · Market access

1 Introduction

This paper discusses the role of the third-country regime and equivalence from the Swiss perspective. References will be made to the EU framework to the extent that the Swiss perspective depends on the EU approach. Although Switzerland is geographically at the heart of Europe, it is not part of the European Union (EU) and has not adhered to the European Economic Area (EEA). Swiss access to the EU financial market significantly relies on the third-country regime. This is particularly relevant given the importance of cross-border financial services.

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Switzerland has long been subject to the extraterritorial reach of foreign law, in particular owing to the tendency of the EU to export its law. The EU approach is partly based on equivalence, which involves an assessment of the comparability of the third-country framework.[1] The Swiss perspective has typically consisted of reaching EU compatibility of its legal framework with the objective of obtaining equivalence.[2] Switzerland has often adapted its legal framework on a voluntary basis to be closer to EU law (*autonomer Nachvollzug*).[3] Nevertheless, it does not always adopt similar rules. 'Swiss finish' refers to the differences, which may go beyond or below the EU requirements, which does not correspond to the EU concept of 'gold plating'.[4] At any rate, EU compatibility is a necessary condition but not sufficient to gain market access to the EU.[5]

The interest at stake is the competitiveness of Swiss market actors providing outbound cross-border financial services. EU compatibility has thus been pursued on a voluntary basis for economic purposes.[6] More recently, the issue has also been addressed from the opposite point of view. The question of the extraterritoriality of Swiss law has started to be posed in the realm of inbound cross-border financial services. As a reaction to the limited EU market access, the idea has emerged that equivalence may be used as a bargaining tool. However, the outcome has been rather limited. The European Commission has adopted a number of equivalence decisions regarding Switzerland.[7] Switzerland has continuously adapted its equivalence strategy depending on the evolving EU approach as well as on the competitive position of Swiss financial services providers. Concern has currently been raised as to whether the EU compatibility strategy followed by Switzerland, which aims at seeking equivalence regarding market access, may need to be revisited. In particular, the pursuit of the competitiveness objective has led to a mixed outcome. I argue that the future of equivalence in the Swiss financial sector should consist of reorienting the discussion around the key objectives of investor protection, market efficiency and financial stability.

This contribution examines differences across various domains of the cross-border regime. First, as EU legislation developed, efforts were made by Switzerland to act as a model student (*Musterstudent*) absent a legal requirement. While Swiss law started to have extraterritorial reach, the idea was to foster cross-border coordination through the equivalence regime. The first notable example of regulation of inbound cross-border financial services in Switzerland stems from the regulatory approval of foreign-based funds pursuant to the Collective Investment Schemes Act (CISA). Second, this paper discusses the evolution of the strategy by analysing the attempt to use equivalence as a bargaining tool. This is well illustrated with the reciprocity

1 Pennesi (2022), p 45.
2 Weber and Sethe (2014), p 570.
3 Heinemann (2013), p 18.
4 Sethe (2015), p 359.
5 Ibid., p 355.
6 Forstmoser (1999), p 523.
7 https://finance.ec.europa.eu/system/files/2023-03/overview-table-equivalence-decisions_en.pdf.

principle introduced in the Financial Market Infrastructure Act (FinMIA) and in the Financial Institutions Act (FinIA). Third, as a reaction to the mixed outcome of the equivalence regime, further financial reform has partly combined extraterritorial reach with national treatment. This has resulted in foreign-based financial services providers having to comply with duplicative rules if they want to enter the Swiss market. The regulation at the point of sale in the Financial Services Act (FinSA) marks a clear departure from the traditional *laissez-faire* approach. This represents a setback in terms of cross-border coordination as host-country rules are applied on a cross-border basis. Fourth, in parallel, regulation at the point of production is also present in the FinSA, where Switzerland accepts the idea of granting equivalence without expecting anything in return. This paper sheds light on the prospectus requirement as well as on the Key Information Document (KID) introduced in the FinSA. As the financial centre benefits from cross-border activities, there should not be any unnecessary burdens to enter the Swiss market. Fifth, more recently, a reduction in efforts to fully align with EU law may lead to the development of a distinct framework. In the realm of corporate sustainability reporting, the Swiss legislator has hitherto accepted the idea that domestic companies that do not operate on a cross-border basis may be subject to less stringent rules, although the legislation may still be overhauled. With respect to companies operating on a cross-border basis, this involves the unilateral recognition of equivalence without a formal assessment of the EU framework.

In terms of cross-border financial services, there are two perspectives: inbound versus outbound. One side of the coin is how Switzerland treats foreign actors providing inbound cross-border financial services. The other side of the coin is how Switzerland treats Swiss providers having outbound cross-border activities. Concern has emerged about the fact that other jurisdictions have extraterritorial reach so that Swiss providers may be subject to foreign rules. Part of the equivalence strategy is to ensure that they are not burdened with double compliance costs. With the aim of cross-border coordination, equivalence is a way to promote the competitiveness of the Swiss financial market sector.

2 From Extraterritoriality to Equivalence

2.1 Extraterritoriality and Cross-Border Coordination – The Case of Collective Investment Schemes

With respect to public law, Switzerland generally applies the territoriality principle.[8] The territorial approach to regulating financial services is mainly characterised by the predominance of home-state regulation.[9] In principle, foreign-based financial services providers are not subject to any licence requirements so long as

[8] Häfelin et al. (2020).

[9] Alexander and Schmidt (2012), p 46.

they do not have a permanent physical presence (*dauerhafte physische Präsenz*) in Switzerland.[10]

Nevertheless, the effects doctrine (*Auswirkungsprinzip*) has gained prominence in financial market law given the regulatory focus on investor protection.[11] Even in the absence of activities conducted within Switzerland, foreign-based operations may have effects in Switzerland. The application of the effects doctrine leads to the extraterritoriality of host-state regulation applying to foreign-based financial services providers. If a host state applies its laws extraterritorially to foreign financial firms that are already subject to home-state regulation, compliance with two or more jurisdictions may impose unnecessary burdens on regulated entities or may even lead to conflicting obligations, thereby making it difficult to operate on a cross-border basis.[12]

Cross-border coordination is crucial to counter the drawbacks of extraterritoriality. As a sub-element of the equivalence approach, selective substituted compliance may be designed to give regulators the opportunity to grant exemptive relief with regard to the quality of regulation and supervision in foreign jurisdictions.[13] Substituted compliance enables foreign entities to be deemed in compliance with host-state regulation by complying with their home-state law and being under the supervisory oversight of their home-state regulator. Substitute compliance provides a mechanism to cope with the unnecessary compliance burdens imposed on financial services providers. This consists of exempting foreign entities from host-country requirements provided that they are subject to acceptable regulatory oversight in their home jurisdiction.[14]

The first notable example of extraterritoriality of Swiss legal provisions stems from the law and regulation of investment funds. The Collective Investment Schemes Act (CISA) applies to inbound cross-border financial services.[15] Initially, the market access question was raised to position the Swiss funds industry, given the fact that Switzerland is neither part of the EU nor part of the EEA. From the EU perspective, the activation of the AIFMD third-country passport system is contingent on an equivalence assessment.[16] Absent an equivalence decision, Swiss investment firms do not benefit from the EU passporting mechanism. The preliminary step consisted of adopting EU-compatible provisions. This illustrates the fact that coupling extraterritoriality with cross-border coordination may eventually support regulatory convergence. Indeed, Switzerland followed the EU developments on a voluntary basis (*autonomer Nachvollzug*), sometimes moved at the same pace as the EU (*Mitvollzug*) or to some extent implemented the rules even before it was legally required in the EU (*Vorvollzug*) in an attempt to act as a model student to show that

10 Nobel (2019), § 7, p 327.

11 Frick and Aggteleky (2015), pp 20–25.

12 Alexander and Darbellay (forthcoming).

13 Jackson (2015), p 182.

14 Alexander et al. (2007).

15 Federal Act of 23 June 2006 on Collective Investment Schemes (Collective Investment Schemes Act, CISA), SR 951.31.

16 Moloney (2023), p 867.

it deserved equivalence.[17] In 2015, the European Securities and Markets Authority (ESMA) came to the conclusion that passporting arrangements could be activated for Switzerland following reforms to its domestic legislation.[18] In 2016, ESMA recommended that the passports be made available to Switzerland.[19] However, since then there has been little sign of the AIFMD's passport system being activated and it still lies dormant.[20]

From the Swiss perspective, according to Art. 120(1) CISA, foreign collective investment schemes are subject to regulatory approval by the Swiss Financial Market Supervisory Authority (FINMA) if they are offered to non-qualified investors in Switzerland. As a host-state regulator, FINMA makes equivalence assessments on a case-by-case basis based on the comparable comprehensiveness of the home-state regulation. Pursuant to Art. 120(2) CISA, foreign funds have the right to request regulatory approval if conditions are met, which include home-state regulation equivalence, home-state supervision intended to protect investors and a cooperation agreement between FINMA and the home-state authority. Thus, regulatory approval may be awarded to foreign funds by FINMA on the basis of an equivalence assessment. FINMA has considered EU rules as equivalent. In the event of regulatory approval, FINMA exercises no supervisory oversight given the recognition of the home-state supervision.

In this field, Switzerland adapted its regulatory framework to be EU compatible. FINMA granted equivalence to the EU without conditioning it on reciprocity. Switzerland was eager to show deference to the EU in the hope of obtaining equivalence in return. Switzerland acted as a model student, yet lost any potential bargaining power and did not obtain the expected outcome.

In practice, not only foreign market actors but also Swiss promoters benefit from the approval process. In fact, Swiss promoters may domicile funds in the EU with a view to accessing the passporting mechanism and then obtain regulatory approval by FINMA in order to offer the units of EU-based investment funds in Switzerland. They may then even use delegation as a market access route by delegating asset management to a provider in Switzerland. This has proved to be more efficient for Swiss promoters than seeking an EU licence in every Member State where their clients are domiciled. In sum, the cross-border rules have been implemented in a way that has not considerably hindered inbound cross-border business. This pragmatical approach has ensured that the Swiss financial centre has not been excessively harmed by the absence of access rights to EU markets.

17 Forstmoser (1999).
18 ESMA (2015).
19 ESMA (2016).
20 Moloney (2023), p 868.

2.2 Contingency and Reciprocity Principle

2.2.1 The Case of Financial Market Infrastructures

In 2015, the Financial Market Infrastructure Act (FinMIA) was adopted as part of the financial reform in the aftermath of the global financial crisis of 2007–2009.[21] Switzerland has refined its equivalence regime by combining extraterritoriality with contingent substituted compliance with a view to creating bargaining power. The use of equivalence as a market access mechanism continues to fall within the objective of strengthening the competitiveness of the Swiss financial centre.

With respect to the participation in Swiss trading venues, foreign participants having no registered office in Switzerland are subject to regulatory authorisation by FINMA (Art. 40 FinMIA). They may be granted market access if they fulfil the conditions provided by Art. 40(1) FinMIA, which include appropriate home-state regulation and supervision and respect of certain duties equivalent to the duties set out in Swiss regulations. Pursuant to Art. 40(2) FinMIA, FINMA is awarded a discretionary power to reject the authorisation if the home state does not grant market access to Swiss participants or if they are placed at a competitive disadvantage as compared to domestic participants.

With respect to the participation of Swiss participants supervised by FINMA, foreign trading venues shall obtain recognition from FINMA before granting them direct access to their facilities (Art. 41(1) FinMIA). They may be deemed recognised if FINMA finds that there is adequate home-state regulation and supervision according to Art. 41(3) FinMIA and if they fulfil the conditions provided by Art. 41(2), which include respect of certain requirements by the home-state supervisory authorities. Again, FINMA is given a discretionary power to refuse recognition if the home state does not grant market access to Swiss trading venues or if they are placed at a competitive disadvantage as compared to domestic trading venues (Art. 41(4) FinMIA).

From the EU perspective, the reciprocity principle is also prevailing. The second Market in Financial Instruments Directive (MiFID II) and the Market in Financial Instruments Regulation (MiFIR) have established a third-country regime enabling EU investment firms to trade shares and derivatives at trading venues located in third countries.[22] This depends on an equivalence assessment by the European Commission and reflects the reciprocity principle. According to the MiFID II/MiFIR requirements, transactions in shares may be executed at third-country trading venues only where the trading venue has been assessed as equivalent in accordance with the conditions applicable under the execution-only regime. Equivalence decisions have

[21] Federal Act of 19 June 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FinMIA), SR 958.1.

[22] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II), [2014] OJ L 173/349, 12.6.2014; Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR), [2014] OJ L 173, 12.6.2014.

a material impact, which was experienced, for instance, following the expiration of the equivalence status of Switzerland as regards share trading.[23] As a consequence, EU investment firms were prevented from investing in Swiss-based trading venues.[24]

The reciprocity principle may indeed well be illustrated by the mutual stock exchange relations between Switzerland and the EU as compared to the UK. On the one hand, after the European Commission failed to extend Switzerland's stock market equivalence beyond 30 June 2019, the Federal Council adopted a measure in November 2018 according to which the recognition of a foreign trading venue ceases once that venue has a registered office in a jurisdiction restricting its market participants in trading equity securities of companies with a registered office in Switzerland.[25] Nevertheless, it activated a protective measure ensuring that EU investment firms could continue to trade Swiss shares on Swiss trading venues even without EU stock exchange equivalence. In so doing, Switzerland has continued to grant market access to EU financial firms, thereby avoiding the adverse impact. While the reciprocity principle treats equivalence as a policy-based decision, the political character of the equivalence process was emphasised with the intervention of the Federal Council. On the other hand, although the same protective measure applied to the UK in the transition period, the UK government recognised Swiss stock exchange regulation as equivalent. The UK parliament confirmed this equivalence determination, which came into force on 3 February 2021. As a consequence, Switzerland deactivated its protective measure in relation to the UK. On the same day, FINMA granted the necessary recognitions to UK trading venues. Trading in Swiss shares could resume in the UK.

With respect to foreign-based central counterparties, they shall obtain FINMA recognition before they grant Swiss participants direct access to their facilities, provide services for a Swiss financial market infrastructure, or enter into an interoperability agreement with a Swiss central counterparty (Art. 60(1) FinMIA). They may be granted recognition if they are subject to appropriate home-state regulation and supervision and if the home-state supervisory authorities respect certain requirements (Art. 60(2) FinMIA). Again, FINMA is given the discretionary power to refuse recognition if the home state does not grant market access to Swiss central counterparties or places them at a competitive disadvantage as compared to domestic central counterparties (Art. 60(3) FinMIA). Moreover, FINMA may exempt foreign central counterparties from the obligation to obtain recognition provided that this does not adversely affect the protective purpose of the law (Art. 60(4) FinMIA). The legal provision once again refers to the reciprocity principle, yet it reflects the fact that the interest of Swiss market participants in being able to use foreign central counterparties may outweigh the interest of foreign central counterparties in making the necessary efforts to obtain Swiss access rights.

23 Moloney (2023), p 885.

24 Pennesi (2022), p 129.

25 Arts. 1(3), 2(1)(b) and 3(3) of the Federal Ordinance of 30 November 2018 on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland, SR 958.2.

With respect to market conduct rules in the realm of derivatives trading, substituted compliance offers market participants the opportunity to substitute compliance with foreign law for compliance with domestic law (Art. 95 FinMIA).[26] Duties are deemed fulfilled if they are fulfilled under foreign law recognised as equivalent by FINMA and if the transaction was executed by a foreign financial market infrastructure recognised by FINMA. Given the application of both domestic and foreign law to Swiss participants in this regard, this substituted compliance provision benefits Swiss participants by avoiding the unnecessary compliance costs that would be generated by duplicative rules. Although there is no reciprocity principle in this provision, its application intersects with the other aforementioned provisions conditioning equivalence on mutual recognition.

FINMA has recognised EU law as equivalent in accordance with Art. 95 FinMIA. Accordingly, the duties vis-à-vis market participants operating abroad are also deemed to have been fulfilled if they are regarded as having been fulfilled under EU law and if the EU financial market infrastructure used to execute the transaction has been recognised by FINMA.[27] Beforehand, participants must determine whether a duty exists and carry out the associated categorisation of its foreign counterparties (Art. 93 et seq. FinMIA).[28] Although Art. 95 FinMIA achieves its purpose, the fact that counterparties subject to equivalent jurisdictions must first be categorised in accordance with the FinMIA causes unnecessary costs and constitutes a competitive disadvantage for Swiss counterparties.[29] Legislative developments are currently envisaged with a view to reviewing the scope of application for compliance with obligations under foreign legislation in the case of cross-border transactions.[30] EU developments are monitored and amendments to the FinMIA may eventually be proposed.[31]

In sum, the extraterritoriality of the legal provision was combined with conditional substituted compliance with a view to creating bargaining power. Substituted compliance permits foreign actors to comply with foreign rules instead of Swiss rules if FINMA has found them to be equivalent to the FinMIA provisions. FINMA is empowered to make equivalence determinations. According to the legal provisions, FINMA may condition equivalence on reciprocity, thereby enjoying discretion. The use of the reciprocity principle conditions cross-border coordination on mutual recognition of regulations by home and host states. Accordingly, foreign-based providers are not legally entitled to be granted market access, though they may obtain it if the conditions are met. Focus is laid on the competitiveness of the Swiss financial sector. However, the reciprocity strategy has not proven fully effective. It is

[26] Bahar (2019), Art. 95, pp 1–3, and Kramer and Favre (2017), Art. 95, pp 1–3.

[27] FDF (2022), pp 19–20.

[28] Ibid.

[29] Ibid.

[30] Ibid., p 20.

[31] Ibid., p 28.

observed that the EU equivalence procedures have provided Swiss financial actors with limited market access rights.[32]

2.2.2 The Case of Financial Institutions

An important pillar of the financial reform consisted of the adoption of the Financial Institutions Act (FinIA).[33] The FinIA has pursued the objective of promoting the competitiveness of the Swiss financial markets by coming closer to EU law with a view to obtaining market access.[34] In fact, the FinIA has adopted a territorial approach combined with a reciprocity strategy. The duty of foreign financial institutions to obtain FINMA's authorisation attaches only in the event of a permanent physical presence in Switzerland, i.e., if they employ persons who perform financial activities on a permanent commercial basis in Switzerland or from Switzerland. Depending on the activities involved, this leads to a branching requirement or a representative office requirement (Arts. 52 and 58 FinIA). The authorisation conditions include appropriate home-state supervision, given the fact that the regime involves deference to the home-state supervisor (Arts. 53 and 59 FinIA). Interestingly, the door is open to mutual recognition based on equivalence. If both sides recognise the equivalent nature of each other's framework, international treaties may allow foreign financial institutions to open branches or representations without requiring FINMA's authorisation (Arts. 52(3) and 58(3) FinIA). This reflects the idea of using equivalence as a bargaining chip. Absent mutual recognition, the reciprocity principle may still come into play. FINMA may make its decision contingent upon the granting of reciprocity by the country in which the foreign institution has its registered office (Arts. 54 and 59(2) FinIA). Even in the absence of reciprocity, the interest of Switzerland in keeping an open market may still result in remaining in the realm of unilateral recognition.

In fact, the application of the reciprocity principle in the realm of branches and representations does not work where foreign states lean towards a subsidiary requirement. For instance, in the field of third-country bank branches (TCBs) in the EU, equivalence regimes exist for TCBs at the national level.[35] If a Swiss bank wishes to gain access to the entire EU, it needs to establish a subsidiary in a Member State and seek authorisation to operate throughout the EU. In 2021, the Commission proposed a harmonised framework for TCBs.[36] This includes a branching requirement, yet the EU supervisor would be empowered to require the establishment of a subsidiary under certain circumstances, including in the event the TCB poses a significant risk to financial stability.[37] In the light of these developments, it is expected that the establishment of a subsidiary remains the rule in the case of Swiss banks seeking

[32] Emmenegger and Bigler (2019), p 174.
[33] Federal Act of 15 June 2018 on Financial Institutions (FinIA), SR 954.1.
[34] See EFD (2018), p 131.
[35] See for further details Busch (forthcoming).
[36] European Commission (2021).
[37] Ibid., p 17.

EU access. Therefore, the reciprocity principle prevailing in the Swiss equivalence provision will likely be of little use in the banking sector. Establishing a subsidiary provides for a more stable market access route. The EU developments have thus contributed to the decline of the equivalence approach as a market access mechanism.[38]

2.3 Regulation at the Point of Sale and National Treatment – The Case of the Provision of Financial Services

Another important pillar of the financial reform consisted of the adoption of the Financial Services Act (FinSA).[39] The legislative debate reflected the fact that awareness had grown regarding the uncertain and politicised nature of the EU equivalence procedures.[40]

In particular, MiFID II/MiFIR requirements became applicable in January 2018 and contain a substantial number of rules applying national treatment. The mandatory branch regime according to Art. 39 of MiFID II reflects an intrusive turn taken by the third-country regime by subjecting third-country branches to almost the full range of MiFID II/MiFIR requirements without benefitting from a passport.[41] National treatment is required, given that compliance with EU rules ensures that Member States do not treat any third-country branch more favourably than EU firms.[42]

As a reaction, the Swiss legislator combined extraterritoriality with national treatment. Foreign providers have become subject to national treatment following the mixed outcome of the equivalence strategy. In many regards, foreign-based financial services providers are subject to Swiss law if they seek market access. In fields of importance to Switzerland, in particular investment advice and asset management, providers of financial services either have to make the compliance efforts required to obtain market access or may renounce entering Swiss markets.

This section focuses on the regulation at the point of sale as part of the FinSA, which results in a clear extraterritorial reach of Swiss financial market law.[43] The notion of 'offer' according to FinSA refers to the offer of financial instruments (Art. 3, let. g FinSA). The Swiss provisions apply to foreign-based entities which provide financial services in Switzerland or for clients in Switzerland (Art. 3, let. d FinSA). This legal provision has to be interpreted. Clients are deemed to be in Switzerland if they are domiciled in Switzerland, yet the provisions do not apply to clients that are merely present in Switzerland for travelling purposes.[44] Accordingly, the notion encompasses the provision of inbound cross-border financial services. However, the

38 Busch (forthcoming).
39 Federal Act of 15 June 2018 on Financial Services (FinSA), SR 950.1.
40 Contratto (2018), p 659.
41 Moloney (2023), p 880.
42 Ibid., p 878.
43 Bahar and Nedwed (2019), p 628.
44 Ibid.

Federal Ordinance excludes reverse solicitation from the scope of the notion of offer (Art. 3(6)(a) Financial Services Ordinance – FinSO).[45] If a Swiss client contacts a foreign-based financial services provider on an unsolicited basis, the provision of financial services does not constitute an offer in accordance with FinSA, provided that the request or initiative of the client was not preceded by advertising within the meaning of Art. 68 FinSA. Accordingly, the reverse solicitation route provides a possible legal avenue for Swiss market access.

In the event of application of the regulation at the point of sale, the FinSA requires direct compliance with Swiss rules. Foreign actors are subject to national treatment in relation to the compliance with the rules of conduct, the registration of investment advisers and the mandatory affiliation to an ombudsman, as described as follows. First, the rules of conduct need to be respected by financial services providers, including foreign actors providing inbound cross-border financial services (Art. 7 et seq. FinSA). Arts. 10-14 FinSA have codified the suitability and the appropriateness tests. The rules of conduct have largely been inspired by the EU MiFID II, yet with a couple of differences.[46] It is worth noting that no equivalence mechanism has been foreseen, thereby effectively leading to duplicative rules in the case of cross-border financial services. Second, the registration of foreign-based investment advisers is required prior to offering investment advice to retail clients in Switzerland (Art. 28 FinSA). This illustrates the regulation of inbound cross-border financial services as a reaction to the regulation of outbound cross-border financial services.[47] Third, the duty to affiliate with an ombudsman applies to foreign-based providers who offer financial services in Switzerland (Art. 77 FinSA). Nevertheless, in September 2020, the Parliament adopted amendments to the FinSA with a view to limiting the mandatory ombudsman affiliation requirement to financial services providers that serve retail clients.[48] Since the entry into force of the amendments in February 2021, the ombudsman affiliation requirement no longer applies to financial services providers serving solely institutional or professional clients.

In a nutshell, although the FinSA has not imposed a branching requirement on foreign-based financial services providers that have no physical presence in Switzerland, the registration of investment advisers is required even in the event of investment advice provided by foreign firms on a pure cross-border basis. However, the Swiss legal provisions do not apply to foreign-based financial services providers if the link to Switzerland merely consists of foreign clients having a bank account in Switzerland. In such a case, solely the Swiss custodian bank falls under the scope of Swiss regulation and supervision.

45 Federal Ordinance of 6 November 2019 on Financial Services (FinSO), SR 950.11.

46 Although the same terminology has been adopted, the coverage of the obligations is not identical.

47 See EFD (2018), p 31.

48 Federal Act of 25 September 2020 on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (DLT bill), AS 2021 33.

2.4 Regulation at the Point of Production and Automatic Recognition – The Case of Product Disclosures

In some domains, the observation that equivalence cannot be used as a bargaining tool led to recognising the equivalence of EU rules without conditioning the assessment on reciprocity. Substituted compliance may aim at the competitiveness of Swiss financial services providers while seeking to avoid placing them at a competitive disadvantage. In the capital markets, financial instruments are subject to mandatory disclosure requirements. In terms of product disclosures, the FinSA includes a prospectus requirement and a Key Information Document (KID). In these fields, Switzerland does not seek to require foreign financial services providers to directly comply with Swiss rules as discussed below.

First, Art. 35 FinSA establishes a prospectus requirement. The prospectus is subject to regulatory approval by a reviewing body prior to its publication (Art. 51 FinSA). In this regard, the Swiss legislator followed EU developments to seek compatibility, but also to ensure that the Swiss framework does not end up more stringent than the EU rules. Indeed, the exemption from the prospectus requirement for public offers was going to be set at a lower threshold in Switzerland, but the Parliament followed EU developments and eventually exempted public offers that do not exceed a total value of CHF 8 million over a 12-month period (Art. 36(1)(e) FinSA).[49] The prospectus requirement applies to all public offerings for securities in Switzerland regardless of the jurisdiction of incorporation of the issuer. This means that foreign-based issuers are subject to the prospectus requirements if their securities are offered in Switzerland. In this field, the reviewing body may approve prospectuses produced under foreign legislation if they were produced in accordance with international standards and in accordance with equivalent information duties (Art. 54(1) FinSA). Foreign prospectuses approved in certain jurisdictions are considered approved in Switzerland as well (Art. 54(2) FinSA). The EU appears in the list of countries whose prospectus approval is recognised in Switzerland by the reviewing body according to Art. 54(3) FinSA. Further, Art. 70 FinSO provides for rules regarding the review and recognition of foreign prospectuses. The strategy consists in accepting equivalence without any reciprocity to give an advantage to Swiss issuers who are allowed to draft a prospectus according to EU law. This results in regulatory deference to EU law. In this way, it is irrelevant to know whether the EU grants equivalence to Switzerland or not.[50]

Indeed, this avoids unnecessary compliance costs due to duplicative rules while contributing to the export effects of the EU rules. With respect to the third-country regime prevailing in the EU, two routes are available to issuers: one based on compliance with the Regulation (Art. 28 of the Prospectus Regulation) and the other based on compliance with relevant third-country rules (Art. 29 of the Prospectus

[49] See EFD (2018), pp 130–131.

[50] Emmenegger and Bigler (2019), p 171.

Regulation).[51] While the first route has worked efficiently by making a prospectus passport available to issuers, the second route – i.e., the equivalence-based one – is of limited value in practice.[52] Accordingly, Swiss issuers have benefitted from passporting rights by directly complying with the EU rules and do not need an equivalence recognition of Swiss rules to access EU markets.

Second, Arts. 58-59 FinSA introduced a Key Information Document (KID) requirement (*Basisinformationsblatt* – BIB) based on EU developments, in particular on the EU KID for PRIIPs.[53] The legislative process raised some concern over not imposing more stringent rules than those prevailing in the EU. Indeed, while the adoption of technical standards was delayed in the EU, the Federal Council observed the EU developments with a view to avoiding their early voluntary implementation in Switzerland.[54] In terms of regulation at the point of production, the producer of financial instruments has a duty to produce a KID. The Swiss KID requirement applies to inbound cross-border financial services, i.e., providers who offer financial instruments in Switzerland have to provide retail clients with a KID. In this regard cross-border coordination is needed. According to Art. 59(2) FinSA, documents prepared in accordance with foreign legislation that are equivalent to the Swiss KID may be used. The FinSO enumerates the foreign laws that are deemed to be equivalent to the Swiss KID and can be substituted for it. According to Art. 87 and Annex 10 FinSO, the EU KID for PRIIPs is deemed to be equivalent to the Swiss KID.[55] Again, this results in the automatic recognition in Switzerland of KIDs established in accordance with EU law.

Finally, it is worth mentioning that regulation at the point of production covers the offer of investment funds. Provided that there is home-state regulation and supervision of foreign-based funds, it is possible to request regulatory approval by FINMA to offer them to non-qualified investors in Switzerland (Art. 120(1) CISA). While the equivalence dimension has remained similar over the previous decades, the adoption of the FinSA led to the relevance of the aforementioned concept of 'offer' as applying to any financial instrument, including units of investment funds.

[51] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (Prospectus Regulation) [2017] OJ L168/12, 30.6.2017.

[52] Moloney (2023), pp 870–871.

[53] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L 352/1, 9.12.2014; see EFD (2018), p 66.

[54] Ibid.

[55] Commission Delegated Regulation (EU) 2017/653 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents, OJ L 100/1 of 12.04.2017.

2.5 Unilateral Recognition – The Case of Corporate Sustainability Reporting

As regards ongoing disclosures, the experiences made in the realm of financial reporting are of interest with a view to understanding the ongoing developments in the field of corporate sustainability reporting. The EU designed a framework encouraging third-country convergence towards the International Financial Reporting Standards (IFRS).[56] In the light of the global uptake of the IFRS, the EU's IFRS equivalence process remains an example of how the EU may use the equivalence process to export its approach to regulation.[57] In fact, Art. 23(4)(third) of the Transparency Directive empowers the European Commission to make an equivalence decision regarding third-country Generally Accepted Accounting Principles (GAAPs).[58] However, the EU has not recognised the equivalence of the Swiss GAAPs with the IFRS. Anyway, Swiss companies have not relied on an equivalence decision regarding Swiss GAAPs from the EU, as they have voluntarily shifted to the IFRS with a view to accessing the EU market. This approach effectively led to regulatory convergence by promoting the use of international standards.

The question arises as to whether similar patterns may be reproduced in the field of corporate sustainability reporting. There is currently no harmonisation of sustainability disclosure rules. Two main approaches have arisen. On the one hand, the EU adopted the Corporate Sustainability Reporting Directive (CSRD).[59] In essence, the EU follows a 'double materiality' approach. On the other hand, the International Sustainability Standards Board (ISSB) issued two sets of global sustainability disclosure standards.[60] The ISSB has adopted to a 'single materiality' approach. Although they are international standards of a soft law nature, they will become mandatory if national jurisdictions incorporate them. I argue that the equivalence mechanism could be an effective tool to nudge jurisdictions into following a framework. If equivalence is considered as a legal question, the question of comparability will, for instance, determine to what extent the rules can be comparable. In my view, the implementation of international standards should be a factor for consideration in the assessment of third-country rules. As such, the equivalence mechanism would prove useful to promote the widespread adoption and implementation of international standards, thereby supporting global convergence.[61]

[56] Moloney (2023).
[57] Ibid.
[58] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive), OJ L 390/38 of 31.12.2004.
[59] Directive 2022/2464/EU of the European Parliament and of the Council of 14 December 2022 amending Regulation No. 537/2014/EU, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (CSRD), OJ L 322, 16.12.2022.
[60] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures, ISSB June 2023.
[61] Alexander and Darbellay (forthcoming).

In addition, the CSRD is characterised by a particularly extensive extraterritorial reach, thereby covering a large number of Swiss enterprises.[62] It covers both EU and non-EU issuers whose securities are listed on EU regulated markets, and the disclosure obligations apply to the entire enterprise.[63] This means that large third-country firms that have debt securities listed on EU regulated markets will be subject to these rules, regardless of the place of listing of their shares.[64] It also covers large EU undertakings and third-country undertakings with substantial activity on the EU Single Market with a European subsidiary or a European branch. The EU decided to require reporting at the consolidated level. If an EU subsidiary or branch is subject to the CSRD, the third-country parent company is indirectly subject to it. The subsidiary or branch must make its best efforts to obtain the necessary information from the third-country undertaking.[65] This approach corresponds to the trend of going for host-country regulation, which is a step back in terms of global integrated markets.

Nevertheless, the CSRD provides a legal basis for the equivalence approach.[66] Accordingly, the Commission is empowered to establish an equivalence mechanism. Further, the CSRD has addressed the topic of the exempted subsidiary undertaking[67] as well as the exempted parent undertaking.[68] For instance, there is a possibility of exempting a subsidiary undertaking based on the sustainability reporting of the parent undertaking. Due to the concern of the competitiveness of EU markets, there is a possibility to exempt a parent undertaking established in the EU when its subsidiary in a third country applies sustainability reporting abroad, which is a form of deference to host-country regulation from the perspective of the enterprise. Accordingly, the CSRD follows a mix-and-match model of host-state regulation and equivalence. Concern has been raised about cross-border coordination.[69] The success of the EU approach will depend on its ability to export its law.[70] In my opinion, the establishment of an equivalence procedure that would give an entitlement to obtain equivalence provided that conditions are met would have a higher nudging effect as compared to the uncertainties occurring around considering equivalence decisions as discretionary acts. Absent a clear equivalence procedure, foreign jurisdictions may find it less compelling to follow the EU approach. This trend may well be illustrated by the analysis of the Swiss legislative developments below.

In Switzerland, new Article 964*a-c* was introduced in the Swiss Code of Obligations (SCO) in June 2020 with a view to rendering non-financial reporting mandatory.[71] The Swiss provisions are essentially inspired by the EU Non-Financial

[62] See further Neri-Castracane and Brander (2023), p 588 ff.

[63] Alexander and Darbellay (forthcoming); Art. 1 as amending Arts. 19a(1) and 29a(1) of Directive 2013/34/EU.

[64] Conac (2022), p 115.

[65] CSRD, Preamble (20) (stating that if not all required information is provided by the third-country undertaking, the subsidiary or branch provides the information in its possession and indicates that the third-country undertaking did not make the required information available).

[66] Ibid., Preamble (24) and Art. 2 as amending Art. 23, para. 4 of Directive 2004/109/EC.

[67] Ibid., as amending Art. 19a(9) of Directive 2013/34/EU.

[68] Ibid., as amending Art. 29a(8) of Directive 2013/34/EU.

[69] Alexander and Darbellay (forthcoming).

[70] Conac (2022).

[71] Art. 964*a-c* of the Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), SR 220.

Reporting Directive (NFRD), i.e., the predecessor of the CSRD.[72] It consists of a static legal transplant of EU legislation.[73] We may refer to an implementation of the NFRD on a voluntary basis (*autonomer Nachvollzug*). Yet there was neither an attempt to anticipate legislative developments (*Vorvollzug*) nor a willingness to keep pace with the EU evolution (*Mitvollzug*), given the fact that the criticism of the NFRD in the run-up to the CSRD was not considered. Nevertheless, it is worthwhile noting that in September 2023, the Federal Council announced its key guiding principles for amending the Swiss corporate sustainability reporting obligations.[74] It is envisaged to partly align the Swiss rules with the CSRD, notably by expanding the scope of application and introducing an audit requirement. A legislative proposal is expected in 2024.

Currently, Art. 964*b*(1) CO follows the 'double materiality' principle, although the meaning of this provision is subject to debate.[75] Art. 964*b*(2) CO provides a non-exhaustive list of elements that have to figure in the report. As explained below, this will likely not give rise to any attempt to obtain equivalence. It rather involves accepting the idea that the private sector may either be directly subject to EU law or apply EU law on a voluntary basis.

Broadly speaking, jurisdictions typically require consolidated reporting. In the face of the unilateral application of national law to an entire multinational corporate group, including subsidiaries established in multiple jurisdictions, the home country will typically be the one applying its law to such an entire corporate group on an extraterritorial basis.[76] From a Swiss perspective, there are two sides of the same coin which must be kept in sight as regards cross-border activities within a group. First, the question arises as to how Switzerland treats foreign-based entities with respect to corporate sustainability reporting. Swiss subsidiaries or branches of foreign companies fall within the scope of the provisions, yet they may be exempted from the Swiss reporting duties if they are subject to equivalent duties under foreign law (Art. 964*a*(2) CO). An equivalence provision allows entities to report under foreign law, thereby avoiding duplicative rules and unnecessary compliance costs.

Second, the issue arises as to how to apply the Swiss provisions to Swiss entities operating on a cross-border basis. Consolidated reporting is required (Art. 964*b*(4) CO). Concern has been raised about unnecessary duplicative rules. Switzerland must consider the fact that EU law goes further by also requiring subsidiaries and branches to make their best efforts to obtain information from third-country parent undertakings. In this reverse case, the exemption pursuant to Art. 964*a*(2)(b) CO is not available. Nevertheless, Art. 964*b*(3) CO makes a dynamic reference to international and EU standards. The use of a dynamic reference gives subjected entities the opportunity to follow developments that go beyond the minimal requirements set forth under Swiss law. The legislator has acknowledged the fact that a considerable

[72] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014 (NFRD).

[73] Heinemann (2013), p 16.

[74] Federal Council (2023).

[75] Schneuwly and Darbellay (forthcoming).

[76] Avi-Yonah (2003), p 17.

number of Swiss companies are directly subjected to EU corporate sustainability reporting given the latter's extensive extraterritorial reach. Accepting the use of international standards and foreign law fosters cross-border coordination and promotes the competitiveness of the Swiss entities due to the awareness of the fact that other jurisdictions have extraterritorial reach so that Swiss providers may directly be subject to foreign rules. This is particularly well illustrated in the case of the EU framework.

In fact, Swiss companies active in the EU will directly adhere to EU corporate sustainability reporting. It is already clear that there is no expectation of obtaining an equivalence decision from the EU. Seeking an equivalence decision is not necessarily a goal. Swiss law has currently gone less far than EU law as it seeks to apply to domestic companies while already accepting the fact that Swiss companies active in the EU will apply the EU rules. This approach practically limits the use of the Swiss rules to domestic companies that are not operating on a cross-border basis. This in turn falls within the strategy of having a legal framework that favours domestic companies.[77]

The question arises as to what extent foreign companies that are active in Switzerland fall within the scope of Art. 964*a-c* CO. According to Art. 964*a*(1) CO, reporting entities are entities of public interest, i.e., listed companies as well as entities falling under the supervision of the financial market authority.[78] Further, the reporting duty applies if certain thresholds are exceeded in terms of size of the firm. The scope is very similar to the NFRD, except for the fact that said thresholds are set out in Swiss francs and not in euros, and except for the fact that the threshold of 500 employees must be met in two successive financial years instead of one.[79] The aforementioned provision has a certain extraterritorial reach given the fact that the law does not specify that it applies only to companies incorporated in Switzerland, and given the fact that Swiss subsidiaries and branches of foreign companies also fall within the scope.[80] In this regard, consolidated reporting is required. According to Art. 964*b*(4) CO, the report must comprise foreign companies that are controlled by Swiss companies, whereby the notion of control according to Art. 963 CO applies.[81] However, if a Swiss company is controlled by a foreign company, the Swiss company has a duty to report, yet Swiss law does not extend to the full foreign group.

In addition, Art. 964*a*(2)(2) CO exempts foreign-controlled entities subject to equivalent regulation in their home state. The notion of control refers to Art. 963(2) CO.[82] With regard to the literal interpretation of Art. 964*a*(2)(2) CO, the exemption applies merely if the foreign holding is legally required to establish a sustainability report. Nevertheless, some scholars have suggested that the teleological interpretation implies that the exemption is also available in the case of voluntary reporting.[83]

77 See further Sethe (2015), p 359.
78 Bühler (2021), p 719.
79 EJPD (2019), p 12; Bühler (2021), p 720.
80 Brand (2021), p 352.
81 EJPD (2019), p 16; Brand (2021), p 356.
82 EJPD (2019), p 13.
83 Brand (2021), p 352; Schenker and Schenker (2023), p 354.

What matters is the equivalence of the standards.[84] The equivalence provision is deemed to avoid duplicative rules.[85]

At any rate, if the Swiss subsidiary or branch controlled by a foreign-based entity wishes to renounce establishing a non-financial report, it still has to ensure that the consolidated report of the parent undertaking is equivalent according to Art. 964*b*(3) CO, i.e., that it includes all the elements required under Art. 964*b*(2) CO.[86]

However, even for companies which are not exempted from the provisions, there is some room in terms of compliance with their reporting obligations according to Art. 964*a* CO. Art. 964*b*(3) CO offers companies the opportunity to establish a report according to national, European or international standards. If the enterprise chooses to apply one of these standards, it must ensure that the minimal requirements of Art. 964*b* CO are met. This means that it may go beyond the Swiss requirements without having to apply duplicative rules, but it may not go below the minimal standards.

The equivalence determination is left in the hands of the subjected entities. There is unfortunately no legal certainty as to what standards are deemed equivalent. It is argued that it would have been better if the provision had delegated authority to the Federal Council to decide which standards are equivalent.[87] It is worth mentioning that under the opting-in system based on voluntary reporting, the SIX Swiss Exchange established a list of internationally recognised standards.[88] As the CO provisions not only encompass listed entities, the SIX Swiss Exchange does not appear to be the most adequate authority to be empowered with equivalence determination. FINMA could have been considered as an authority to be empowered with equivalence determination, yet not all reporting entities are financial entities supervised by FINMA. In the current system there is no formal procedure as regards equivalence decisions, leaving the responsibility with the reporting enterprise. The legal provisions are minimal requirements. Art. 964*b*(3) CO explicitly mentions the guidelines of the Organisation for Economic Co-operation and Development (OECD) as an example, which in turn refer to the OECD Guidelines for Multinational Enterprises.[89] Further standards which are considered equivalent are, *inter alia*, the Global Reporting Initiative (GRI),[90] the UN Principles of Responsible Investment (PRI), the UN Global Compact, as well as the ISO 26000 Social Responsibility and the Sustainability Accounting Standards Board Standards (SASB Standards).[91] With respect to other standards, companies have to examine whether they satisfy the

[84] Brand (2021), p 352.

[85] EJPD (2019), p 13.

[86] Schenker and Schenker (2023), p 354.

[87] Brand (2021), p 355.

[88] Art. 9 SIX Directive on Information Relating to Corporate Governance (Directive Corporate Governance, DCG), 29.06.2022; Art. 9 para. 2.03 SIX Directive on Regular Reporting Obligations for Issuers of Equity Securities, Bonds, Conversion Rights, Derivatives and Collective Investment Schemes (Directive Regular Reporting Obligations, DRRO), 06.12.2022; Fischer (2021).

[89] EJPD (2019), p 15.

[90] Ibid.; Brand (2021), p 355.

[91] Rehbinder (2015), pp 20 f; EJPD (2019), p 16.

minimum requirements pursuant to Art. 964*b* CO.[92] What is striking is the lack of harmonisation efforts and the ensuing lack of comparability that will be generated if companies follow different sets of standards. If the standards selected do not cover all the necessary elements, enterprises will merely need to provide a supplemental report (Art. 964*b*(3)*i.f.* CO). Unless the law is amended, the EU guidelines – the 2017 and 2019 versions – will likely continue to be regarded as equivalent given the fact that the Swiss provisions were inspired by the implementation of the NFRD framework.[93] There is indeed no legal obligation to follow the amended framework owing to the fact that covering all the elements required by the Swiss legal provisions is sufficient. Nevertheless, compliance with the CSRD framework will, in principle, be considered equivalent. In this way, it will be possible for subjected entities to substitute compliance with the CSRD framework for compliance with the Swiss reporting obligations. Moreover, in my view, compliance with the ISSB framework will also be deemed sufficient. Even though the ISSB follows the ‘single materiality’ rather than ‘double materiality’ principle, the rules are very detailed and cover the elements required under the current Swiss legislation. Accordingly, unless the legislation is overhauled, the private sector will have a choice between various sets of standards.

3 The Legal, Economic and Political Nature of Equivalence

Broadly speaking, Switzerland has adopted a relatively liberal equivalence regime. Inbound cross-border financial services are not subject to insurmountable regulatory hurdles. From the Swiss perspective, the primary purpose of equivalence provisions has often consisted of aiming at obtaining market access to the EU. However, this strategy has had a rather limited outcome. Following the June 2016 decision of the United Kingdom to leave the EU (Brexit), the EU has used the process of granting equivalence as a political bargaining tool, also adversely impacting Switzerland.[94] The question of the nature of equivalence has thus been increasingly debated.

On the one hand, recognising the legal nature of equivalence would give an entitlement to be awarded a positive equivalence decision provided that the legal requirements are met. On the other hand, the political nature of equivalence would make it an arbitrary act. The Swiss equivalence regime navigates somewhere between these two extremes. The analysis of the diversity of Swiss legal provisions relating to equivalence has shed light on the various factors for consideration, varying from imposing legal prerequisites to incorporating arbitrary elements. In terms of the legal analysis, equivalence is about assessing the comparability of foreign law with domestic law, which typically ranges from assessment of the regulation to

[92] Fischer (2021), p 16; Schenker and Schenker (2023), p 354.

[93] European Commission (2017); European Commission (2019); Brand (2021), p 355; Sethe and Hiddink (2021), p 1017.

[94] Conac (2019), p 77; Jutzi and Schären (2019), pp 416, 423.

assessment of the adequate home-state supervision, the latter playing a role whenever a positive equivalence assessment leads to deference to the home-state supervisor. The Swiss perspective has long favoured global capital markets and welcomed cross-border coordination. Several Swiss provisions open the door to mutual recognition of equivalence in a treaty, yet with a very limited outcome in practice. Moreover, some provisions require an equivalence assessment by an authority, which may range from a formal procedure with legal entitlement if the conditions are met, to an informal process awarding discretion to the competent authority, which typically translates into the possibility to take reciprocity into account or not. The competent authority is generally FINMA, which is either asked to assess the equivalence on a case-by-case basis or empowered to award unilateral recognition. Unilateral recognition may be given contingent on reciprocity or may even be given absent reciprocity, which has frequently occurred in the relationship with the EU.

Most importantly, even legal questions may involve some degree of uncertainty given the fact that the legal analysis depends on the circumstances of the case. In the EU, the equivalence process notably comprises a risk management exercise, including financial stability concerns.[95] Financial stability is an indeterminate legal concept that requires a dynamic interpretation. Apart from that, equivalence is also of an economic nature. On the one hand, the economic interest in protecting the domestic financial sector may lead to refusing equivalence. This may have been a factor for consideration from the EU perspective. On the other hand, the purpose of promoting the competitiveness of the financial sector may lead to attempts to use equivalence as a bargaining tool. This has characterised some of the developments in Switzerland over the previous decades. In fact, a main driver of the relentless quest for EU compatibility has been the pursuit of the competitiveness of the Swiss financial sector, yet with a limited outcome in terms of equivalence decisions taken by the European Commission. Interestingly, the UK discussion has also evolved around competitiveness, which has however been highly controversial.[96] I argue that this question should also be debated in Switzerland. The main purpose of financial reforms should be centred around the key objectives of investor protection, market efficiency and financial stability. EU-compatible amendments are welcome if they improve the key objectives, yet they are not necessary if they are made for the wrong reason. Competitiveness should therefore no longer be put forward as an objective, especially owing to the decline of equivalence as a market access mechanism.

4 Conclusion

In sum, the Swiss approach to the EU third-country regime is a reaction to the equivalence mechanism, more precisely to the limited market access due to the absence of equivalence in key areas. Over the previous decades, different strategies have been used with respect to different aspects as regards the third-country regime

[95] Busch (forthcoming).

[96] Moloney (forthcoming).

and equivalence. The strategy has evolved, depending essentially on the relationship with the EU. In terms of the objective, the common ground is that the competitiveness of the Swiss financial centre has always been at the heart of the discussion. It can be observed that the deployed strategies have resulted in limited market access.

A determining aspect is the nature of the authority in charge of the assessments. In the EU, equivalence decisions are generally made by the European Commission. In Switzerland, the power to make equivalence determinations falls within the authority of FINMA in various domains of the financial sector. This ranges from regulatory approval by FINMA, if certain conditions are met, to regulatory recognition by FINMA, which, in turn, is contingent on reciprocity. In some cases, equivalence decisions are made by the reviewing body, while in other instances, the responsibility of the determination is left in the hands of the subjected enterprises. Also, there are cases of regulatory deference where there has been no attempt to use market access as a bargaining tool.

The Swiss experience highlights the fact that equivalence can no longer be considered the main route to EU market access. Recent developments have marked a departure from the relentless quest for EU compatibility. An evolution is underway from a complete rule-taker approach towards increasing autonomy of Swiss financial market law. Absent an automatic reflex to continuously follow the EU developments with a view to promoting the competitiveness of the financial sector, future financial reforms should be recentred on balancing the key objectives of investor protection, market efficiency and financial stability. The analysis of the Swiss perspective has demonstrated that the hope of obtaining favourable equivalence decisions in the endless pursuit of competitiveness is ill-advised. Nevertheless, EU developments remain a useful source of inspiration whenever they are considered to improve the key objectives of financial regulation. Moreover, it is crucial to observe the UK developments, in particular the likely implementation of a 'take back control' approach.[97] Given the similar challenges involved, ongoing UK law reforms are of great importance while rethinking the future of equivalence in the Swiss financial sector. This topic offers a fascinating research agenda for academics and is of interest to policymakers and regulators.

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[97] Ibid.

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