

CLIENT ALERT

# UK and Swiss Mutual Recognition Agreement: The Berne Financial Services Agreement

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On 21 December 2023, the UK and Switzerland signed a 'mutual recognition' agreement (the "MRA" or the "Agreement"). Under the MRA each country's regulatory regime applicable to the wholesale financial services sectors is recognised as the basis for a provider in one country to offer financial services to persons in the other country. It is based on 'deference' to the regulatory standards and level of supervision applied by each country to its supervised firms, where each country is confident that the rules of the other achieve similar regulatory objectives and outcomes in relation to investor protection, market integrity and financial stability.

This form of agreement is therefore different from the approach used in the European Union's single market where cross border access is based on a common set of regulatory standards that apply throughout the whole of the European Union. The approach under the MRA concept allows each country to develop its own regulatory standards as it sees fit and for the parties to review such developments to determine whether they will be recognised under the MRA. Indeed, it is possible for recognition of new areas to be added and for recognition of existing areas under the MRA to cease. The MRA is intended, in this sense, to be a 'living' agreement, the provisions of which may change from time to time.

The Agreement both enhances cross-border market access for financial services and provides a formal foundation for the ongoing development of the financial services relationship between the two countries.

The Agreement is intended to deepen market access between the two jurisdictions in relation to asset managers, investment firms, direct general insurers and intermediaries, who can undertake activities within the other jurisdiction on the basis of

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'home state' regulatory supervision. Therefore, a firm that wants to provide financial services into the 'host state' will not have to either establish in the host state or seek local authorisation. Such a firm can instead rely on its own domestic authorisation and is exempt from a number of host-state rules.

### Key Concepts

There are three key concepts in the Agreement that firms should be aware of in order to determine whether their activities may be within scope:

- (i) **Covered Financial Services Supplier** – this describes the type of financial services firms that may be eligible to benefit from the Agreement. The type of firm will vary according to the particular sector in which they operate but a common theme is that they must be authorised in their home state.
- (ii) **Covered Clients** – this describes the type of persons to whom financial services may be provided in the host state. Again, the type of client will vary from sector to sector but a common theme is that the Agreement is not applicable to financial services provided to retail investors (other than certain high net individuals) or consumers.
- (iii) **Covered Services** – this describes the types and scope of services that may be provided by a Covered Financial Services Supplier to a Covered Client in the host state. The Agreement currently provides for five financial services to be in scope: asset management, banking, insurance, investment services and financial market infrastructures.

The rules for determining who is a Covered Client and what is a Covered Service are those of the host state. So, for example, a UK firm that is a Covered Financial Services Provider under the UK rules, would have to determine what services it may provide and to whom under the Swiss rules relating to the relevant financial sector. It is likely, therefore, that firms will need advice from both UK and Swiss advisors to determine whether the scope of their activities are within the scope of this Agreement.

The remainder of this alert will focus on the aspects of the Agreement concerning insurance, asset management and investment services.

### Asset Management, Insurance and Investment Services

#### (i) **Asset Management**

Annex 1 of the Agreement covers asset management activity. It is split into two sections, with Part 1 containing the terms upon which each party will permit the marketing of AIFs or collective investment schemes by managers authorised in the other party's jurisdiction, and Part 2 containing the terms upon which portfolio and/or risk management may be provided under a delegation arrangement by an authorised firm in the other party's jurisdiction.

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The Agreement confirms the existing frameworks in place in the UK and Switzerland for the marketing of funds to professional investors and qualified investors, respectively. The respective UK and Swiss regimes are straightforward and relatively open and the Agreement contains a commitment to preserving this level of openness. The Agreement allows a firm to delegate portfolio and risk management services to a firm holding the appropriate authorisations in the other territory with respect to the assets of funds, pension schemes and insurance companies, subject to certain conditions such as compliance with outsourcing requirements.

### **(ii) Insurance**

Annex 4 of the Agreement contains the terms upon which each party may provide cross-border market access to insurers and insurance intermediaries authorised in the other party's jurisdiction. It is without prejudice to the 'Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Direct Insurance other than Life Insurance' agreed on 25 January 2019, which grants mutual branching rights and equal freedom of establishment for UK and Swiss general insurers. The latter agreement was essentially a post-Brexit rollover of the pre-existing agreement between the European Union and Switzerland. Thus the Agreement is concerned only with the cross-border provision of insurance.

#### Covered Services

The scope of Annex 4 comprises primary (re)insurance business, (re)insurance distribution activities and 'services auxiliary to insurance', such as consultancy, actuarial, risk assessment and claim settlement services.

#### Scope of Insurance Cover

The Agreement covers a broad range of general insurance risks, and mutual market access is provided for each of the following: (i) damage to or loss of water vessels or motor vehicles; (ii) other property damage (including as a result of fire and other natural forces); (iii) miscellaneous financial loss; (iv) legal expenses and litigation costs; and (v) credit and suretyship. The Agreement also covers reinsurance for all classes of underlying insurance risk.

However, the scope of insurance cover is subject to certain carve-outs, notably accident, sickness and life insurance business. There are also other carve-outs applicable to UK firms providing insurance into Switzerland (such as certain types of liability insurance) and for Swiss firms providing insurance into the UK (motor assistance). UK (re)insurers also will only be able to underwrite policyholders' insurance risks situated in Switzerland (or risks of their Swiss or UK subsidiaries situated in either Switzerland or the UK).

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### Conditions

The Agreement generally only applies to wholesale (re)insurance activities, and no covered services can be performed in either jurisdiction in respect of prospective insureds / cedants falling below prescribed size thresholds.

Annex 4 also contains a number of conditions for UK-covered financial services suppliers who wish to access the Swiss market, which are set out in the paragraphs below:

Insurers must be Solvency II firms (and the Agreement therefore would not apply to smaller insurance firms), and must meet solvency requirements without factoring in the impact of capital relief measures such as matching and volatility adjustments, and transitional measures on technical provisions. They must also have no life insurance liabilities (although a small amount of life insurance liabilities stemming from non-life insurance contracts are permitted), which would appear to preclude composite insurers from benefitting from the Agreement. Additionally, insurers are required to ensure that staff involved in the distribution of insurance contracts understand Swiss insurance law and regulation.

UK Covered Financial Services Suppliers must disclose the following to Swiss clients:

- Insurers: (i) their name; (ii) that they are authorised in the UK and not by FINMA (the Swiss insurance regulator); (iii) that the client is personally responsible for any taxes levied on premium payments in Switzerland; (iv) their contact details; and (v) the place of jurisdiction and applicable law of the contract to be entered into.
- Insurance intermediaries: (i) that the client is personally responsible for any taxes levied on premium payments in Switzerland; and (ii) the place of jurisdiction and applicable law of the contract to be entered into.

All UK Covered Financial Services Suppliers also must, upon request from a Swiss client, provide the client within 30 days a full copy of the client file.

### Reporting

UK insurers who access the Swiss insurance market under the Agreement must provide annual reports to FINMA containing the following information: (i) their name; (ii) the types of services and classes of insurance business provided to clients; and (iii) the total value of gross premium for activities carried out in the reporting period, where the total value of gross premiums exceeds CHF 5,000,000 (around £4,600,000).

However, Swiss insurers seeking to enter the UK insurance market are not subject to parallel reporting requirements.

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### Notifications

UK insurers who wish to access the Swiss insurance market must notify FINMA (and provide the PRA with a copy of the notification) indicating the services that they intend to supply into Switzerland, including the relevant classes of insurance for the purposes of being maintained on a FINMA register of insurers.

The PRA is required to notify FINMA within 30 days of this notification whether it is satisfied that the insurer complies with the eligibility requirements set out in Annex 4, and is otherwise in good standing. The PRA must also inform FINMA if it subsequently becomes aware that an insurer ceases to fulfil either criteria, or is subject to material complaints.

FINMA similarly must notify the PRA if it suspects that a UK insurer operating within Switzerland either does not meet the eligibility criteria set out by the Agreement, or is likely to cause material harm to clients or the integrity or stability of the Swiss financial system.

In the event that either party issues a notification to the other, the parties will commence dialogue to resolve the matter. FINMA may commence 'host intervention power' (described below) if this dialogue ultimately proves to be unsuccessful.

### Impact of the Agreement

The Agreement goes beyond the terms of the 'Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Direct Insurance other than Life Insurance' agreed on 25 January 2019, which grants mutual branching rights and equal freedom of establishment for UK and Swiss general insurers, in that it provides for the provision of insurance on a cross border 'services' basis. The UK will also be the sole trading partner exempted from new Swiss legislation that requires overseas insurance brokers to localise in Switzerland.

However, the Agreement's provisions are intricate. UK firms, for example, will have to ensure that they can meet the solvency capital requirements without certain capital relief measures that are currently available in order to qualify as a Covered Financial Services Supplier. They will need to take care that they only provide insurance within the scope of Covered Services to persons who qualify as Covered Clients. Such firms should consider taking appropriate advice from their UK and Swiss professional advisors if they wish to utilise the provisions of the Agreement.

By contrast, the Agreement may not have a material impact on pure reinsurers in either jurisdiction. A number of Swiss reinsurers may have already implemented operating models that enable them to underwrite UK risks from offshore without falling within the UK perimeter. Overseas pure reinsurers (including those from the UK)

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with no establishment in Switzerland are exempt from Swiss regulation in underwriting Swiss reinsurance agreements under the Swiss Insurance Supervision Act of 17 December 2004.

### (iii) **Investment Services**

Annex 5 of the Agreement contains the terms upon which each party will provide cross-border market access to investment firms authorised in the other party's jurisdiction.

#### Covered services

The services covered by Annex 5 are effectively identical to the investment services and activities listed under MiFID II, with the addition of the service of *"communications made to or directed at natural persons resident in the UK and their agents and as well as private investment structures established in the UK to ascertain whether any such person qualifies as a HNWI."*

#### Conditions

The conditions set out in the table below must be satisfied in order for an authorised firm to provide covered services:

<b>From Switzerland into the UK</b>	<b>From the UK into Switzerland</b>
Provision of a pre-contractual disclosure document, which clearly and prominently displays information prescribed by the Agreement.	Provision of a disclosure document before providing services, which clearly and prominently displays information prescribed by the Agreement.
Provision of an annual report to the FCA and FINMA that includes information prescribed by the Agreement (such as total turnover attributable to the supply of investment services to clients).	Notification to the FCA of the intention to provide services in Switzerland, prior to commencing the provision of such services.
Notification to the FCA from the firm (with a copy provided to FINMA) which sets out the services to be provided in the UK.	-

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Firm has been placed on the Register with respect to the supply into the UK of the notified services.	-
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The Agreement expands upon the open access UK firms already benefit from with respect to the Swiss market by introducing commitments to allow firms to provide cross-border investment services to institutional and professional clients (including HNWIs<sup>1</sup>). As noted in the above conditions table, individuals acting on behalf of authorised UK firms will no longer be required to register with Swiss registration authorities as client advisers, provided their activity does not amount to a permanent establishment in Switzerland. As part of this development, UK client advisers that provide services to HNWIs in Switzerland will no longer be required to sit examinations and complete the registration process. The Agreement also introduces improvements to the framework for Swiss firms to access the UK market, including the creation of a bespoke mechanism for Swiss firms to conduct business with HNWIs in the UK.

The Agreement does not prescribe the form by which UK and Swiss investment firms or insurers notify host-state regulators of their wishes to access their markets on a cross-border basis. Each regulator is instead expressly obligated to ensure that its own firms comply with the terms of the Agreement.

### **'Host Intervention Power'**

Any issues arising under the Agreement are primarily intended to be dealt with via cooperation between the UK and Swiss regulators, and unilateral host intervention power is only envisaged in extreme scenarios.

However, the Agreement provides FINMA with the power to take various enforcement actions under Annex 4 if it considers that a UK insurer or intermediary is not complying with the terms of the Agreement, and the matter has not been satisfactorily resolved between the UK and Swiss regulators. These enforcement actions include: (i) restricting a UK firm from accessing the Swiss insurance market; (ii) determining an orderly wind-down of the UK firm's cross-border activities in Switzerland and removing the UK firm from its register; and (iii) publicly notifying the UK firm of the enforcement action that it has decided to take.

The Agreement also provides UK regulatory bodies powers equivalent to those set out at (i)-(iii) above but only with respect to Swiss firms carrying out investment services in the UK market.

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<sup>1</sup> A natural person who (i) has net assets in excess of GBP 2 million, (ii) in light of the services and the nature of the related transactions, is capable of making his or her own investment decisions and understanding the risk involved, and (iii) has made the necessary prescribed declaration in a standalone document.

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### Next Steps

The Agreement is intended to be dynamic and flexible to enable the UK and Switzerland to address new possibilities in their respective domestic regulatory landscapes. The Agreement already includes a joint commitment by both parties to cooperate relating to regulatory developments in the field of sustainable finance, for example with a view to establishing internationally comparable sustainability-related corporate disclosure standards. The UK is in the process of finalising its own rules on Sustainability Disclosure Requirements and investment labels and we anticipate that the parties to the Agreement will, for example, include in negotiations mutual recognition of mandatory climate-related corporate disclosures.

The timing for the Agreement's entry into force is currently unclear. Whilst the text of the Agreement has been agreed in full between the UK's HM Treasury and the Swiss Federal Department of Finance, each jurisdiction will need to ratify the Agreement in accordance with its own domestic legislative process. The Agreement will then enter into force on the first day of the second month following the parties' notifications to each other of the completion of their respective domestic legislative processes.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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