

Consolidated supervision of financial groups under the BA and FinIA

Practice relating to consolidated supervision and its scope and content

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Addressees (indicative)					
X	Banks	BA			
X	Financial groups and congl.				
X	Persons under Article 10 BA				
	Other intermediaries				
		ISA			
	Insurers				
	Insurance groups and congl. Intermediaries				
		FinIA			
	Portfolio managers				
	Trustees				
	Managers of collective assets				
	Fund management companies				
X	Investment firms (proprietary trading)				
X	Investment firms (non propriat. trading)				
	Trading venues	FinMIA			
	Central counterparties				
	Central securities depositories				
	Trade repositories				
	Payment systems				
	Participants				
	SICAVs	CISA			
	Limited partnerships for CIs				
	SICAFs				
	Custodian banks				
	Representatives of foreign CIs				
	Other intermediaries				
	SROs	AMLA			
	SRO-supervised institutions				
	Audit firms	Other			
	Rating agencies				

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I. Subject and scope of application

This Circular describes FINMA's practice regarding consolidated supervision in accordance with Article 3*b*–3*g* of the Banking Act (BA; SR 952.0) and Articles 21–24*a* of the Banking Ordinance (BO; SR 952.02). It provides specific information on consolidated supervision along with its scope and content. 1

The circular is aimed at financial groups pursuant to Article 3*c* BA and banks pursuant to Article 1*a* BA that are part of a financial group. 2

The Circular also applies *mutatis mutandis* to financial groups dominated by securities firms in accordance with Article 49 of the Financial Institutions Act (FinIA; SR 954.1) and securities firms in accordance with Article 2 para. 1 let. e in conjunction with Article 41 FinIA that are part of a financial group (Art. 49 para. 3 FinIA), as well as to financial groups dominated by persons pursuant to Article 1*b* BA and persons pursuant to Article 1*b* BA that are part of a financial group (Art. 1*b* para. 1 in conjunction with Art. 3*c* para. 1 BA). 3

In the following, banks, persons under Article 1*b* BA and securities firms within the scope of this circular are referred to collectively as “institutions” for reasons of simplicity. 4

II. Consolidated supervision

A. Scope of application

In application of Article 3*d* BA, FINMA generally subjects financial groups pursuant to Article 3*c* para. 1 BA and financial conglomerates dominated by banks or securities firms pursuant to Article 3*c* para. 2 BA to consolidated supervision. 5

Pursuant to Article 3*c* para. 2 BA, a financial conglomerate dominated by a bank or securities firm is a financial group pursuant to Article 3*c* para. 1 BA that operates primarily in the banking or securities firm sector and includes at least one insurance company of substantial economic importance. 6

In the following, financial groups and conglomerates are referred to collectively as “financial groups” for reasons of simplicity. 7

B. Interpretation of the provisions of Articles 3*b* and 3*d* BA

If a financial group exists in the legal sense, Articles 3*b* and 3*d* BA apply. If a financial group exists, consolidated supervision is generally assumed. 8

C. Ring-fencing measures are an exception

In exceptional cases, FINMA may exercise its discretion under Article 3*b* and 3*d* para. 1 BA to waive the requirement for consolidated supervision. In order to address the specific risks of the individual case, FINMA may demand suitable preventive ring-fencing measures or other measures (e.g. adjustment of the group structure) instead of consolidation, applying the principle of proportionality. Due to the risks associated with a financial group and the importance of consolidated supervision, as well as its international 9

recognition, consolidated supervision is the rule and ring-fencing measures or other measures are the exception.

The relationship between ring-fencing and consolidated supervision of financial groups arises in particular from the licensing requirements for institutions that are part of a foreign financial group. In accordance with Article 3b BA or Article 55 FinIA, FINMA may require appropriate consolidated supervision by a foreign supervisory authority in such cases. 10

If, in individual cases, appropriate consolidated supervision by a foreign supervisory authority is not present, FINMA may isolate the institution from the foreign financial group in an appropriate manner by ordering ring-fencing measures. This possibility exists if the institution is exposed to risks that can be minimised with ring-fencing measures. In such cases, ring-fencing measures are aimed at eliminating connecting elements between foreign financial groups without, or without adequate, consolidated supervision abroad and the institutions belonging to them that are domiciled, effectively managed or administered in Switzerland. 11

In particular, the following ring-fencing and/or other measures exist, which are usually applied in combination in individual cases: 12

- Corporate governance measures to strengthen the independence of the institution's management and decision-making bodies from the financial group; 13
- Financial measures to protect client assets or to limit the institution's financial interdependencies with the financial group; 14
- Structural measures with an impact on the financial group structure; 15
- Reduction of business interdependencies, access to group systems, customer referrals or requirements for business activity; 16
- Specific information and reporting obligations to FINMA. 17

III. Scope of consolidated supervision (regulatory scope of consolidation)

A. General information

The scope of consolidated supervision (regulatory scope of consolidation) for banks and persons pursuant to Article 1b BA is determined in accordance with Article 3c BA and Articles 21–24a BO. For securities firms, the regulatory scope of consolidation is determined in accordance with Article 49 FinIA. The provisions of the Banking Act on financial groups apply by analogy to financial groups dominated by securities firms (Art. 49 para. 3 FinIA). 18

For the question of consolidated supervision to arise, there must be a group of at least two companies, at least one of which operates as an institution. The principle of substance over form applies, whereby the legal form of the company is not decisive. 19

The question of whether a company is included in the regulatory scope of consolidation is determined on the one hand by the business activity of the company (operating primarily in the financial sector) and on the other hand by the existence of an economic unit 20

(control via majority shareholding or otherwise), a legal duty to provide support or a de facto obligation to provide support.

The regulatory scope of consolidation is assessed and applied by the institution on a case-by-case basis, taking into account all facts and circumstances. The audit firm examines this assessment as part of the audit in accordance with Articles 2–4 of the Financial Market Auditing Ordinance (FINMA-PV; SR 956.161). In accordance with Article 29 para. 2 of the Financial Market Supervision Act (FINMASA; SR 956.1), the institution or the audit firm notifies FINMA (Art. 27 para. 2 and 3 FINMASA) of any significant decisions made by the institution on consolidation due to certain incidents (whether or not the scope of consolidation is adjusted). 21

B. Activity in the financial sector

The definition of the term “activity in the financial sector” in accordance with Article 4 BO is not limited to activities that are subject to a licensing or registration requirement under Swiss financial market legislation. It is defined more broadly and generally includes the provision and intermediation of financial services. The list of activities specified in Article 4 para. 1 let. a BO is not exhaustive. This means that other business activities can also constitute activities in the financial sector. This includes, in particular, finance leasing, factoring, credit card business, participation in issues and the custody of securities, payment services and the issue and custody of payment instruments (including payment tokens). For the purposes of consolidated supervision, group companies that carry out purely commercial, industrial or administrative activities are not considered to be active in the financial sector. 22

Activity in the insurance sector is generally deemed to be activity in the financial sector (cf. Art. 4 para. 2 BO). 23

The assessment of the provision and intermediation of services for financial transactions pursuant to Article 4 para. 1 let. a BO applies the principle of substance over form, irrespective of the technology used. 24

C. Interconnected system

According to Article 3c para. 1 let. c BA, in order for an interconnected system to be assumed, the companies operating in the financial sector must form an economic unit or be linked by a legal duty to provide support or a de facto obligation to provide support (Art. 22 BO). 25

According to Article 21 para. 1 BO, an economic unit exists if a company directly or indirectly holds more than half of the votes or capital in other companies or controls them by other means. 26

Control can be exercised by other means in particular due to: 27

- the control of voting rights on the basis of an agreement with other shareholders (voting rights agreement, shareholders’ agreement); 28
- the direct or indirect right to appoint or remove a majority of the members of the supreme management or administrative body; 29

- a significant influence on the management (e.g. through the – contractual or other – power to exercise a significant influence on the executive management or business policy, for example through co-determination rights with regard to important decisions). 30

The circumstances listed in margin nos. 27–30 above, which are not exhaustive, can also lead to control by other means in combination and with or without an additional minority shareholding. 31

The inclusion of a company in consolidated supervision can also be triggered in another way without a majority shareholding or control, provided that other elements of a legal or factual nature indicate a legal duty to provide support and thus an interconnected system. 32

A legal or de facto obligation to provide support pursuant to Article 21 para. 2 BO may arise in particular from: 33

- strategic, personnel, organisational or financial interdependencies, 34
- cooperations and dependencies, 35
- the use of a joint company, 36
- a uniform market presence or 37
- letters of comfort, keepwell agreements or similar guarantees. 38

The list of circumstances that may give rise to an obligation to provide support is not exhaustive. This means that other links can also lead to a de facto obligation to provide support if these may create the impression for third parties that there is an interconnected system. The higher the participation rate, the lower the other links can be in order to justify inclusion in consolidated supervision. 39

D. Financial group structures

Financial groups can be categorised according to their structure as follows: 40

a) Parent company structure

The financial group is headed by an institution (parent company). The regulatory scope of consolidation comprises the parent company and one or more group companies active in the financial sector in accordance with Article 4 para. 1 in conjunction with Article 22 BO. 41

b) Holding structure

The financial group is headed by a holding company in accordance with Article 4 para. 1 let. b BO. It controls at least one institution and possibly other group companies active in the financial sector. 42

Several multi-layered holding companies can also control a financial group. The top holding company active in the financial sector is generally the top unit of the financial group for regulatory consolidation purposes. 43

In application of Article 23 para. 2 BO, FINMA may exclude a holding company from the regulatory scope of consolidation in justified cases if it is immaterial for the consolidated supervision of the financial group. A holding company is deemed immaterial for 44

consolidated supervision if it fulfils the following four conditions cumulatively and permanently:

- the holding company does not control any other company active in the financial sector in addition to the institution; 45
- the holding company does not engage in any financial activities of its own, apart from holding the equity interest in the institution; 46
- the holding company has no influence on the institution's business activities; 47
- the holding company is not leveraged to any significant extent. 48

In the case of holding companies that are considered immaterial for consolidated supervision and are not included in the regulatory scope of consolidation, the audit firm comments in the audit report on the audit in accordance with Articles 2–4 FINMA-PV on whether the criteria set out in margin nos. 45–48 above are met on a permanent basis. 49

If an institution is controlled by a holding company that predominantly holds qualifying holdings in companies not active in the financial sector, FINMA examines whether measures are necessary to ring-fence the institution from the rest of the group (see margin no. 12 ff.). 50

c) Atypical structure

Atypical structures or interconnected systems include, in particular, contractual groups and similar structures as well as de facto financial groups (structures controlled in parallel). 51

In the case of contractual groups, the group companies are not linked to form an economic unit through control of capital or voting rights, but on the basis of a contract. Typically, central organisations and their affiliated institutions can be constituted as contractual groups or similar structures in accordance with Article 17 BO. 52

In the case of de facto financial groups, the financial group is headed by one or more individuals who, in addition to an institution domiciled or effectively managed in Switzerland, also directly or indirectly control other companies active in the financial sector. In the case of de facto financial groups, the rules applicable to other types of financial groups are applied by analogy. 53

In the audit report on the audit of de facto financial groups in accordance with Articles 2–4 FINMA-PV, the audit firm comments on whether individuals with a qualifying holding or partners with unlimited liability of institutions in the legal form of a partnership control other companies active in the financial sector. 54

d) Subgroup of a foreign financial group

A subgroup of a foreign financial group is a financial group subject to consolidated supervision by FINMA that is part of a foreign financial group. The subgroup of a foreign financial group may be controlled externally directly by a foreign group parent company or indirectly by a holding company or via one or more other group companies of a foreign financial group. The subgroup of a foreign financial group may have a parent company structure, a holding structure or another group structure internally. 55

e) Subordinated financial group as part of a financial group subject to FINMA supervision

A subordinated financial group is a subgroup within a financial group supervised by FINMA. It comprises at least one institution domiciled in Switzerland and one or more group companies active in the financial sector. A subordinated financial group may have a parent company structure or a holding structure internally. 56

E. Group companies

In principle, consolidated supervision by FINMA covers all group companies of a financial group that are active in the financial sector (Art. 23 para. 1 BO). 57

The following should also be noted: 58

a) Group companies with activities pursuant to Article 3a BO

Significant group companies pursuant to Article 2^{bis} para. 1 let. b BA in conjunction with Article 3a BO are deemed to be active in the financial sector (Art. 4 para. 1 let. c BO). The functions of a group company domiciled in Switzerland are significant with respect to the activities which require authorisation if they are necessary for the continuation of important business processes. They fall under FINMA's insolvency jurisdiction. FINMA designates the significant group companies and keeps a list of them (Art. 2^{bis} para. 3 BA). 59

b) Special purpose vehicles

Special purpose vehicles (SPVs) are also to be included in the regulatory scope of consolidation regardless of their legal form if the requirements of Article 3c para. 1 BA in conjunction with Article 4 para. 1, Article 21 and Article 22 BO are met. 60

F. Distinction between the scope of consolidation for the consolidated financial statements and the regulatory scope of consolidation

The scope of consolidation for the consolidated financial statements is determined in accordance with the accounting standard applied (see no. IV.B. below), while the regulatory scope of consolidation is determined in accordance with the provisions explained in III.A.-E. above. Accordingly, the regulatory scope of consolidation may differ from that for the consolidated financial statements, particularly in the case of group companies that are not active in the financial sector or that are included in the regulatory scope of consolidation due to a de facto obligation to provide support. 61

IV. Content of consolidated supervision (group-wide provisions)

In principle, the same provisions apply to financial groups on a consolidated basis as to institutions on an individual basis (Art. 3e BA). 62

The content of consolidated supervision is defined in Articles 3f and 3g BA in conjunction with Article 24 para. 1 BO. It can be divided into qualitative and quantitative elements. 63

A. Qualitative elements

The qualitative elements include the following requirements: 64

- Appropriate organisation of the financial group (Art. 24 para. 1 let. a BO) 65

Financial groups regulate the tasks and responsibilities for the group management and set these out in internal group management regulations. In simple situations, these can also be integrated into the general organisational regulations of the institution. The requirements in margin no. 98 f. of FINMA Circular 2017/1 “Corporate governance – banks” must be taken into account. In both cases, the regulations must be approved by FINMA. 66
- Appropriate internal control system of the financial group (Art. 24 para. 1 let. b BO) 67
- Appropriate risk management of the financial group (Art. 24 para. 1 let. c BO) 68
- Group-wide combating of money laundering (Arts. 5 and 6 FINMA Anti-Money Laundering Ordinance; AMLO-FINMA; SR 955.033.0) 69
- “Fit and proper” requirements for persons in the financial group management (Art. 24 para. 1 let. d BO) 70
- Separation between the body responsible for management and the body responsible for governance, supervision and control at financial group level (Art. 24 para. 1 let. e BO) 71

This provision applies to financial groups pursuant to Article 3c para. 1 BA, financial conglomerates pursuant to Article 3c para. 2 BA and financial groups that are dominated by securities firms within the meaning of Article 41 lets. a and c FinIA (client traders and market makers). 72
- Mandating of a recognised, independent and competent audit firm to audit the financial group in accordance with Articles 2–4 FINMA-PV (Art. 24 para. 1 let. i BO) 73

Group companies that are supervised institutions in accordance with Article 3 FINMASA appoint the same audit firm or an audit firm belonging to the same network for the regulatory audits at single entity level. FINMA may authorise exceptions in justified cases (Art. 13 para. 2 FINMA-PV). 74

B. Quantitative elements

The quantitative elements of consolidated supervision comprise the following requirements: 75

- Capital adequacy and risk diversification requirements (Art. 4 para. 1 BA in conjunction with Art. 24 para. 1 let. f BO) 76

For financial groups of banks and account-holding securities firms, the capital adequacy requirements and risk diversification rules apply on a consolidated basis in accordance with the Capital Adequacy Ordinance (CAO; SR 952.03). For financial groups of non-account-holding securities firms, the provisions on capital adequacy and risk diversification pursuant to Article 46 para. 2 FinIA in conjunction with 77

Article 70 of the Financial Institutions Ordinance (FinIO; SR 954.11) apply.

Subordinated financial groups are generally subject to the duty to consolidate pursuant to Article 11 CAO. For financial groups dominated by persons pursuant to Article 1b of the Banking Act, appropriate capital requirements are imposed on a case-by-case basis.

- Interest rate risk reporting on a consolidated basis (FINMA Circular 2019/2 “Interest rate risks – banks”) 78

- Liquidity requirements (Art. 4 para. 1 BA in conjunction with Art. 24 para. 1 let. g BO) 79

The Liquidity Ordinance (LiqO; SR 952.06) applies to financial groups of banks and account-holding securities firms. Subordinated financial groups are generally subject to the duty to consolidate for liquidity purposes (margin no. 105 and margin no. 365 of FINMA Circular 2015/2 “Liquidity risks – banks”). For financial groups of non-account-holding securities firms, the provisions on liquidity pursuant to Article 46 FinIA in conjunction with Article 71 para. 1 FinIO apply. 80

- Financial reporting standards (Art. 24 para. 1 let. h BO) 81

The applicable financial reporting standards for the consolidated financial statements of financial groups of banks or securities firms (Art. 48 FinIA) are the Swiss accounting rules for banks (Arts. 33–42 BO), the IFRS Accounting Standards of the International Accounting Standards Board (IASB) or the United States Generally Accepted Accounting Principles (US GAAP) of the Financial Accounting Standards Board (FASB). The latter two are international accounting standards recognised by FINMA (Art. 3 of the FINMA Accounting Ordinance (FINMA-AO; SR 952.024.1)). 82

Pursuant to Article 1b, para. 4 let. a BA, accounting for persons under Article 1b BA is governed exclusively by Article 957 ff. of the Swiss Code of Obligations (CO; SR 220). Group accounting for financial groups dominated by persons pursuant to Article 1b BA is therefore governed by Article 963 ff. CO. 83

Subordinate financial groups are generally exempt from preparing subgroup financial statements unless FINMA requires this in justified cases (Art. 35 paras. 3 and 4 BO). 84

C. Criteria for exemption from the quantitative elements for group companies that are immaterial for consolidated supervision (Art. 23 para. 2 BO)

In justified cases, FINMA may exempt group companies in the financial sector from consolidated supervision or declare its content to be only partially applicable to them, in particular if a group company is immaterial for consolidated supervision (Art. 23 para. 2 BO). FINMA grants exemptions for group companies with regard to the quantitative elements, but not with regard to the qualitative elements. 85

A fundamental exemption from the quantitative elements of consolidated supervision (see no. IV.B.) is possible if the financial group comprises only immaterial group companies apart from the institution. Materiality is assessed separately for each of the quantitative regulatory areas (Art. 35 para. 1 let. a BO, Art. 9 para. 1 let. a CAO, margin no. 355 ff. of FINMA Circ. 15/2, margin no. 3 of FINMA Circ. 19/2). 86

If only individual, but not all group companies are immaterial, the immaterial entities are excluded from the quantitative elements of consolidated supervision. The assessment of materiality for the individual regulatory areas is carried out separately. 87

When assessing the materiality of group companies, it must be taken into account that several group companies that are immaterial on an individual basis may be material as a whole. 88

The materiality of group companies is assessed by the institution. The audit firm examines this assessment as part of the audit in accordance with Articles 2–4 FINMA-PV. 89