Selling a licensed Swiss business

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Share sale or asset sale

A Swiss crypto business is sold in one of two ways. A transfer of the shares in the AG or GmbH leaves the licences, contracts and customer relationships in place. A transfer of assets and liabilities moves the business to the buyer's own entity. The share sale is simpler where the target holds a licence or an SRO affiliation, because those attach to the entity and survive a change in ownership subject to the approvals described below. The asset sale is preferred where the buyer wants to leave behind liabilities it cannot assess, which in a crypto business means undisclosed exposure to hacks, to customer claims and to regulatory breaches in earlier years. The Merger Act permits a transfer of assets and liabilities by a single registered agreement that moves all listed assets and liabilities to the acquirer without individual assignment, with joint liability of the transferor for three years.[1] Customer contracts and custody relationships do not move under that mechanism without the customers' consent where the contract is personal, which custody contracts are. An asset sale of a custodian therefore requires either consent from each customer or a migration process in which each customer opens a relationship with the buyer.

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Change-of-control approvals

The approvals depend on the target's status. A FinIA institution (portfolio manager, trustee, manager of collective assets, fund management company or securities firm) must notify FINMA before any person acquires or disposes of a qualified participation of 10 per cent or more, or crosses the 20, 33 or 50 per cent thresholds. Portfolio managers and trustees are exempt from the notification duty. They remain subject to the general requirement that qualified participants be of good repute.[2] A bank requires FINMA's approval under the Banking Act for a change in qualified participants. The fintech licence under Art. 1b BankA follows the banking rules.[3] A DLT trading facility or other financial market infrastructure requires notification and FINMA's assessment under the FinMIA.[4] An SRO-affiliated financial intermediary with no FINMA licence requires no approval. The SRO's regulations require notification of changes in the controlling persons and the governing bodies, after which the SRO may conduct a new fit-and-proper review.[5]

FINMA's review of a change of control asks the questions it asked at licensing: who are the new qualified participants, where does their money come from, what is their regulatory history, and what do they intend to do with the business. A buyer from outside Switzerland that is itself unregulated will be asked for more than a regulated buyer. A buyer that intends to change the business model should say so, because the licence was granted for a model and a different one may need a new application. The review takes two to four months for a FinIA institution and longer for a bank.

Notes

1. Merger Act (FusG), SR 221.301, Arts 69 to 77 (transfer of assets and liabilities: contract, inventory, registration in the commercial register, transfer by operation of law on registration) and Art. 75 (joint and several liability of the transferor for three years). ↩
2. FinIA, SR 954.1, Art. 11 paras 4 to 7 (qualified participations; notification to FINMA before acquisition or disposal and on crossing the 20, 33 and 50 per

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cent thresholds; exemption of portfolio managers and trustees from the notification duty under para. 7). ↩

3. Banking Act, SR 952.0, Art. 3 para. 2 lit. cbis (qualified participants must ensure that their influence is not detrimental to prudent business) and para. 5 (notification duty on acquisition or disposal of a qualified participation and on crossing thresholds); Art. 1b para. 4 (application to fintech licence holders). ↩
4. FinMIA, SR 958.1, Art. 9 para. 3 and para. 5 (notification of qualified participations in a financial market infrastructure). Part E, Chapter V. ↩
5. AMLA, SR 955.0, Art. 14 para. 2 (conditions of affiliation, including good repute of the persons responsible for administration and management); VQF, Rules of the Self-Regulatory Organisation, as revised (notification of changes in management and controlling persons within the time stated). Part F, Chapter I. ↩

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