THE FINANCIAL TECHNOLOGY LAW REVIEW

Second Edition

Editor
Thomas A Frick

THE LAWREVIEWS

THE FINANCIAL TECHNOLOGY LAW REVIEW

SECOND EDITION

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PREFACE

This is already the second edition of *The Financial Technology Law Review*. Concerns about new developments that blockchain, big data and AI will trigger in the finance sector have not disappeared since the first edition. However, the use of IT in the finance sector is not new and many applications that would be labelled today as fintech are already quite old, at least by today's standards. Financial market participants and their legal advisers already have considerable experience in implementing such changes. As far as improved support products are concerned, the general rules of financial regulations can be applied quite easily to new developments.

Some of the recent developments may already have seen their peak, for example, the great number of cryptocurrencies imitating bitcoin. Others, in particular stablecoins and security tokens, but also robo-advisers and the use of big data, AI and other blockchain applications, may still be at an early stage. They may have the potential to disrupt the industry, at least in some of its sectors. Again, there has been more scepticism, not only in a recent report by the Bank for International Settlements but also in management consultant studies such as 'Blockchain's Occam problem', arguing that blockchain is a technology in search of a problem.

Regulators' surprise about the sheer dynamism of these advances – both the speed of the technical developments and the speed with which such new possibilities were implemented – has ebbed and a number of countries have started to draft (or have already implemented) new laws or changes to their current laws to address fintech issues. This is particularly the case in the area of anti-money laundering rules, a prime concern not only of regulators but also of banks and other financial market participants. Unless the industry can be certain that participating in the crypto-economy will not lead to increased anti-money laundering risks, established financial players remain cautious.

The national solutions chosen (and the speed with which regulators are willing to react by providing guidelines to market participants) varies considerably between jurisdictions. This may be a consequence of different regulatory cultures, but in addition, the existing legal systems may pose varying and unplanned obstacles to the some of the new applications. It may, for example, be difficult to transfer rights on the blockchain if the national code prescribes that rights can only be assigned in writing. Therefore, a structured collection of overviews over certain aspects of fintech law and regulation such as the present one continues to be valuable not only for the international practitioner, but also for anyone who looks for inspiration on how to deal with hitherto unaddressed and unthought-of issues under the national law of any country.

The authors of this publication are from the most widely respected law firms in their jurisdictions. They each have a proven record of experience in the field of fintech; they know

both the law and how it is applied. We hope that you will find their experience invaluable and enlightening when dealing with any of the varied issues fintech raises in the legal and regulatory field.

The emphasis of this collection is on the law and practice of each of the jurisdictions, but discussion of emerging or unsettled issues has been provided where appropriate. The views expressed are those of the authors and not of their firms, of the editor or of the publisher. In a fast-changing environment, every effort has been made to provide the latest intelligence on the current status of the law.

Thomas A Frick
Niederer Kraft Frey
Zurich
April 2019

Chapter 23

SWITZERLAND

Thomas A Frick[1]

I OVERVIEW

The approach taken in Switzerland to fintech continues to be a supportive and positive one, both by the government and by the ecosystem. Although no separate financial regulatory regime exists for fintech companies, the existing rules are applied in a way that enables a lively fintech scene to grow. Furthermore, rules were and are about to be changed to enable, for example, crowdfunding to operate more effectively, banks to do a fully digital onboarding of clients and financial institutions to experiment with new business models. The Swiss Financial Markets Supervisory Authority (FINMA) set up a special fintech desk and declared that it intends to structure regulation in a technology-neutral way. The Swiss government initiated a Crypto-Initiative and set up a working group for blockchain and initial coin offering (ICOs) in January 2018, which led to a comprehensive report in December 2018 and an equally comprehensive proposal for focused changes to existing laws published on 22 March 2019. For example, in the canton of Zug, even taxes can be paid in bitcoin.

A summary of the regulatory framework as in force today can be found on FINMA's website.[2] Regular updates on developments are available on a (private) site.[3]

The regulatory framework (equally applicable to any other financial service provider in Switzerland) is particularly based on the Federal Act on Banks and Savings (the Banking Act), the Stock Exchange Act (SESTA, to be abolished by the Financial Institutions Act by 1 January 2020), the Anti-Money Laundering Act (AMLA), the Collective Investment Schemes Act (CISA) and the Financial Market Infrastructure Act (FMIA). In addition, provisions of the Federal Act on Data Protection (FADP), the Consumer Credit Act (CCA) or the Federal Act against Unfair Competition (UCA) may be applicable. FINMA and the Swiss Federal government have on various occasions emphasised that they regard innovation as a key for the Swiss financial centre and encourage digitalisation as well as technological advancements. FINMA holds regular fintech roundtables and has designated a team as fintech desk to be the contact point for fintech companies (however, it also set up a dedicated fintech team in its enforcement department, and initiated a great number of investigations in particular against ICOs).

There is also no separate tax law system applicable to fintech companies in Switzerland. Fintech projects and investments in digital currencies and tokens are therefore taxed like any other traditional investment vehicle. However, the tax administration declared that, for example, bitcoin will be treated like a foreign currency for tax purposes, so that no value

1 Thomas A Frick is a partner at Niederer Kraft Frey.

2 https://www.finma.ch/de/bewilligung/fintech/.

3 http://fintechnews.ch/.

added tax is levied. Cantonal tax administrations have published a number of guidelines on how cryptocurrencies are treated for tax purposes. As the Swiss tax authorities are willing to issue tax rulings, fintech projects can obtain a ruling and thereafter operate with certainty about the tax regime applicable to them.

Overall Switzerland can be considered as a very fintech-friendly jurisdiction, despite the fact that no fintech specific regulation or tax regime exists. Many fintech startups and projects show that the legal environment is considered as advantageous. Currently, the main impediment for fintech projects in the field of cryptoassets is to find suitable partners in the traditional finance industry, although the number of crypto-brokers and exchange projects is increasing, and despite the Swiss Bankers Association issuing guidelines for the opening of bank accounts for crypto-projects in 2018.

II REGULATION

i Licensing and marketing

Under Swiss law, no specific fintech licence exists at present, as Swiss regulation is technology-neutral and principle-based. Nonetheless, a fintech company may be subject to a licence or ongoing compliance and reporting obligations. Some forms of financial business activities are prudentially supervised by FINMA on an ongoing basis and require a licence granted by FINMA, while others only have to join one of Switzerland's self-regulatory organisations that were set up to ensure compliance with anti-money laundering requirements. The regulations of these self-regulatory organisations (SROs) are recognised by FINMA as a minimum standard for anti-money laundering (AML) compliance.

Depending on their business model, fintech companies are particularly likely to fall within the scope of the Banking Act, the SESTA and the AMLA.

Banking Act

According to the Swiss Banking Act, anyone who accepts 'deposits from the public on a commercial basis' is subject to banking licence requirements.[4] This is the case if either:

a deposits of more than 20 investors are actually held; or

b the person or entity publicly announces to a non-limited number of persons that it is willing to accept such funds (regardless of the final actual number of investors).

Thus, fintech companies that accept or raise funds stemming from the public, such as crowdfunding or ICOs, may fall under bank licence requirements. Bond issues do not qualify as deposits, and capital contributions that do not entail a repayment obligation also do not qualify as deposits, which is why ICOs are possible – under certain conditions – under Swiss law.

In order to better accommodate Swiss fintech projects, the Swiss government (the Federal Council) in 2017 amended the Ordinance on Banks and Savings Banks (the Banking Ordinance) to include exemptions from the requirement to obtain a licence. As from 1 August 2017, the holding of client funds (of more than 20 investors and for a period longer

4 Article 1 Paragraph 2 Banking Act.

than 60 days) no longer triggers banking licensing requirements (as it is no longer deemed to meet the requirement of 'on a commercial basis') if certain requirements are met. These requirements are:

a the funds do not at any time exceed 1 million Swiss francs;
b the funds are neither reinvested nor interest-bearing (with exceptions); and
c the depositors have been informed in writing or otherwise in text form prior to making the deposits that their funds are not covered by the Swiss depositors protection regime and that the institution is not supervised by FINMA.

With regards to (a), the threshold will be calculated on the basis of the aggregate deposits held at any given period.

In addition, funds on settlements accounts may be held for 60 days (previously only seven days) if they are not interest-bearing.[5] This provision in particular aims to allow crowdfunding companies to hold assets for a longer period without requiring a banking licence.

Furthermore, on 1 January 2019, a special licence was introduced: undertakings accepting deposits from the public of up to 100 million Swiss francs, but not paying interest on such deposits, may qualify for a 'banking licence light' – a licence that subjects such undertaking to rules less stringent than the rules applicable to banks.[6]

SESTA

A licence from FINMA is required in order to act as securities dealer.[7] A securities dealer is any natural person or legal entity or partnership that commercially buys and sells securities on the primary market for their own account for short-term resale or for the account of third parties, offers them publicly on the primary market or even creates or publicly offers derivatives.[8] The term 'securities' is now defined in the FMIA and means, in accordance with Article 2 Lit. b FMIA, 'standardised certificated and uncertificated securities, derivatives and intermediated securities, which are suitable for mass trading'. Further clarification is provided by Article 2 of the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, which states in Paragraph 1:

> *Securities suitable for mass standardised trading encompass certificated and uncertificated securities, derivatives, and intermediated securities which are publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, insofar as they have not been created especially for individual counterparties.*

Therefore, for trading tokens it is relevant whether these are qualified as securities within the meaning of SESTA (see below, on ICOs). The SESTA will be abolished on 1 January 2020, with the coming into force of the new Financial Institutions Act. Securities traders will be renamed securities houses, but the general regulatory framework applicable to them is not expected to change much.

5 Article 5 Paragraph 3 Lit. c Banking Ordinance.
6 Article 1a and 1b Banking Act.
7 Article 10 Paragraph 1 SESTA.
8 Article 2 Lit. d SESTA.

AMLA

Even if neither a banking nor a securities dealer's licence is required, AML regulations and provisions may apply. Swiss AML regulations apply to institutions that are considered *per se* as financial intermediaries (e.g., banks, securities dealers, fund management companies and insurances) and institutions that engage in a 'financial intermediary activity (e.g., asset managers, investment advisers with power of attorneys). If a fintech company is engaged in financial intermediary activity, it is required to join a recognised Swiss AML SRO or submit to direct supervision by FINMA on AML matters, and needs to comply with the applicable AML duties (such as identification of customer, establishment of beneficial ownership). Some of the AML duties entail sanctioning provisions under criminal law, and such provisions are equally applicable to fintech companies. Under a recent proposal of the Federal Council, the applicability of AML rules to fintech companies will be further specified and enlarged.

Further rules

Fintech companies may market their products and services under the same rules as established financial service providers. Restrictions apply in particular if a company looks for funds and contacts more than 20 potential investors (see above).

If an institution were to set up an automated digital advisory in Switzerland, the same licence requirements would apply as for any other institution offering non-digital advisory services. At the current stage, a 'pure' investment advisory without any power of attorney over client's accounts is not subject to licence requirements (but will become subject to behavioural rules similar to the Markets in Financial Instruments Directive by 2020). Investment advisory with a power of attorney is not subject to a licence requirement; however, the institution will be required to subject itself to the supervision of an AML SRO (or alternatively directly to supervision by FINMA).

Credit information services may be provided subject to the FADP; under Swiss law, this Act applies not only to persons but to legal entities as well, so that any information about corporate credit ratings may fall under the scope of the Act.

Financial Services Act and Financial Institutions Act

In 2020, the Financial Institutions Act (FinIA) and the Financial Services Act (FinSA) are expected to enter into force simultaneously, and they will bring major changes to the regulation of the Swiss financial market.

ii Cross-border issues

As Switzerland is not a member of the European Union, regulated or licensed activities may not be passported into Switzerland. Holding a licence abroad may sometimes make a licensing process in Switzerland more cumbersome, as FINMA may reach out to the foreign authority in order to find an agreement on consolidated supervision, which may prove to be a lengthier process.

Companies that provide services to clients in Switzerland on a pure cross-border basis (cross-border inbound) without physical presence may require a licence in certain instances. The distribution of collective investment schemes is permitted only if done by reverse solicitation, namely, on the initiative of the investor itself. The same applies with respect to insurance products. Both collective investment schemes and insurance products are subject

to strict rules on marketing. Under today's rules, however, cross-border inbound marketing of banking products, as a rule, does not require a licence (but will subject the marketing company to the new FinSA rules from 1 January 2020).

A service provider is deemed to have physical presence in Switzerland if it has a branch or similar formal presence in Swiss territory, or the presence of individual persons in Swiss territory on a permanent basis who are employed or mandated by licensee to act on its behalf. The term 'on a permanent basis' means having individuals permanently on the ground in Switzerland, or individuals who frequently travel to Switzerland for the purpose of carrying out sales or marketing activities in Switzerland. FINMA has not published guidance on what constitutes frequent travel; whether travel is frequent is assessed by evaluating all relevant facts and circumstances (i.e., frequency of travel, number of persons traveling to Switzerland, etc.). FINMA has substantial discretion when assessing whether physical presence is established in Switzerland.

There are no Swiss laws of general application prohibiting or subjecting to prior approval foreign investments in Switzerland. Therefore, foreign investors do not generally need formal approval for their investments in Switzerland and no special governmental authority monitors them. Foreign investments in certain regulated industries might require governmental permission. If foreign nationals have a controlling influence on a bank, a securities trader or certain other prudentially supervised entities active in the financial sector (a finance company), the granting of a respective licence by FINMA is subject to certain additional requirements. Investment restrictions also apply to the acquisition of residential (but not commercial) real estate in Switzerland by foreign or foreign controlled persons and under the Telecommunications Act for radio communication licences, under the Nuclear Act for nuclear power plants, under the Radio and Television Act for broadcasting licences and under the Aviation Act for the professional transport of passengers or goods.

Switzerland does not have currency controls in place. Hence, both investments and repatriation of the capital and profits are possible.

III DIGITAL IDENTITY AND ONBOARDING

There is currently no generally recognised digital identity in Switzerland. However, various efforts have been undertaken to raise digital awareness in Switzerland and to introduce a generally recognised digital identity. On 22 February 2017, the Federal Council presented a draft for a Federal Act on Recognised Electronic Identification (the E-ID Act), which was approved by the first chamber of parliament in March 2019. Under the E-ID Act, private providers (supervised by the federal administration) would be authorised to issue recognised digital identities. On 22 November 2017, two private project groups (one from the Swiss Federal Railway and the Postal Services; the other from the former state telecom and the two major banks UBS and Credit Suisse) announced that they will join forces and set up such a private provider under the name of Swiss-Sign. It is expected that this will lead to the establishment of a broadly accepted Swiss E-ID, available not only to nationals but also to non-Swiss citizens; however, the details of the limitations are still subject to discussions.

Switzerland has known for some time already the electronic signature that guarantees the authenticity of a document, a message or other electronic data and ensures the identity of the signatory.

Since 2016, financial service providers may carry out fully digitised onboarding of clients. On 17 March 2016, FINMA published Circular 2016/7 'Video and Online

Identification', which entered into force on 18 March 2016 (revised in 2018) and stipulates AML requirements with regard to the onboarding process of clients via digital channels. The circular applies directly to financial intermediaries. Subject to adherence to specific requirements, financial intermediaries may onboard clients by means of video transmission.

IV DIGITAL MARKETS, FUNDING AND PAYMENT SERVICES

i Collective investment schemes

Collective investment schemes governed by CISA are assets, raised from investors for the purpose of collective investment, which are managed for the account of such investors, whereby the investment requirements of the investors are met on an equal basis.[9] Open-ended collective investment schemes are organised under company or contract law; closed ones only under company law.

ii Crowdfunding

Under Swiss law, crowdfunding is permitted and does not *per se* trigger a licence requirement. However, if crowdfunding includes 'assets raised from investors for the purpose of collective investment' and these crowdfunding assets are managed for the account of such investors (by a third party), subject to equal treatment provisions, they would qualify as collective investment scheme within the meaning of CISA. In such case, the respective requirements according to CISA would have to be adhered to.

iii Crowd-lending

Crowd-lending, also known as peer-to-peer lending, is not *per se* regulated. However, depending on its specific set-up, it may fall within the scope of the Banking Act, SESTA, AMLA, etc. In addition, a consumer credit agreement is a contract whereby a creditor grants or promises to grant credit to a consumer in the form of a deferred payment, a loan or other similar financial accommodation.[10] In general, the CCA will be applicable to crowd-lending activities if the counterparty were to qualify as a consumer. In such case, the respective rules of the CCA would have to be adhered to, for example, the maximum interest possible for consumer credits currently amounts to 10 per cent.[11]

Platforms providing crowdfunding and crowd-lending services do not require a licence if the funds of the investors are directly sent to the projects (i.e., not through the platform). If funds are sent via accounts of the platform, this can only be done without a banking licence if the account is non-interest-bearing, the funds are kept not longer than 60 days on the account and the client is informed that the platform does not hold a licence. The platform will need to register as a financial intermediary with an SRO and to comply with AML obligations.

Even the project developer may qualify as a bank if it accepts more than 20 loans and the amount exceeds 1 million Swiss francs.

9 Article 7 Pararaph 1 CISA.

10 Article 1 Paragraph 1 CCA.

11 Article 14 CCA and Article 1 of the Ordinance on the Consumer Credit.

Loans can be traded on secondary markets, subject to compliance with AML laws. However, the transfer of a loan requires either transfer of the contract or assignment of the claim. Assignment of claims can only be done in writing; in other words, with a handwritten (or electronic) signature of the assignor.

iv Payment systems

Payment systems only require a licence from FINMA if they are deemed relevant for the proper functioning of the financial market or for the protection of financial market participants and if the payment system is not operated by a bank.[12] In order to be eligible for a FINMA licence as a payment system, certain requirements have to be met; for example, the applicant must be a legal entity under Swiss law and have its registered office and head office in Switzerland,[13] provide for a guarantee of irreproachable business conduct,[14] the minimum capital of the applicant must be fully paid in[15] and the applicant must possess appropriate IT systems.[16]

Switzerland not being a member of the European Economic Area, it decided not to implement the second Payment Services Directive of the EU. This means that there is no harmonisation of interfaces and no general access to accounts for third-party payment service providers must be granted by Swiss banks. However, as banking services in Switzerland are often cross-border, it is expected that many banks will soon provide open access to account interfaces upon request of their clients.

V CRYPTOCURRENCIES AND INITIAL COIN OFFERINGS

Switzerland does not have a specific regulation for blockchain technology. Blockchain projects fall under the regulatory regimes of the industries they are applied to, such as the finance industry. Cryptocurrencies caught the attention of the Swiss regulator early: in June 2014, FINMA published a fact-sheet on bitcoin and confirmed that bitcoins qualify as currency (i.e., that payments with bitcoin do not require a licence). Soon, Switzerland and in particular the 'Crypto Valley' in the canton of Zug established itself as one of the world's hubs for ICOs, in particular through the Etherum ICO from July to September 2014. Thereafter, there were a number of high-profile ICOs that caught the attention of the fintech world. At the time, FINMA did not provide specific guidance, although its fintech desk was willing to grant negative clearance to projects submitted.

On 16 February 2018, FINMA published the 'Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)' (the ICO Guidelines), wherein it describes in some detail how it deals with the supervisory and regulatory framework for ICOs under Swiss law. It does so by outlining the principles on which it will base its response to specific enquiries, and by providing a checklist of information required to be submitted in an application for negative clearance. These ICO Guidelines are available electronically on the

12 Article 4 FMIA.
13 Article 8 FMIA.
14 Article 9 FMIA.
15 Article 12 FMIA.
16 Article 14 FMIA.

FINMA website.[17] The ICO Guidelines provide some guidance on regulatory matters but do not deal with issues of civil or criminal law. Hence, specific legal advice continues to be needed for any ICO.

A key message given by the ICO Guidelines is that FINMA continues to be ready to review ICOs and to give negative clearance, as far as regulatory aspects are concerned. When reviewing a project, FINMA will consider, among other things, not only the investor categories an ICO targets, compliance with AML regulations, and the functionalities of the token generated including the rights it confers to the investor, but also the technologies used (distributed ledger technologies, open source, etc.), the technical standards (such as the Etherum ERC20) and the wallets and technical standards to transfer tokens.

FINMA distinguishes three token categories:

a payment tokens (i.e., cryptocurrencies), which are intended to be used as a means of payment and do not grant any claims against the issuer of the token;

b utility tokens, which grant access to an application or service; and

c asset tokens, which represent assets such as a debt or equity claim against the issuer, or that enable physical assets to be traded on the blockchain.

If a token combines functions of more than one of these categories, it is considered a hybrid token and has to comply with the requirements of all categories concerned.

To assess whether tokens qualify as securities under Swiss law, FINMA applies the general definition of the Swiss Financial Market Infrastructure Act. For the time being, FINMA will not consider payment tokens to be securities; utility tokens will only be considered securities if they have an investment purpose at the point of issue. Asset tokens will be considered as securities.

FINMA confirms that the creation of uncertificated securities and their public offering are not regulated, unless they qualify as derivative products. However, underwriting and offering (in a professional capacity) security tokens of third parties publicly on the primary market is a licensed activity. Furthermore, the issuing of tokens that are similar to bonds or shares may trigger prospectus requirements under the Swiss Code of Obligations.

FINMA confirms that the issuing of tokens will not qualify as deposits; in other words, it does not require a banking licence, unless the tokens grant claims with debt capital character against the issuer (for that reason, FINMA recently took action against Envion). Collective investment schemes regulations may apply if the funds received by an ICO are managed by third parties.

Issuing payment tokens will trigger the application of the anti-money laundering act (AMLA) provisions, if the tokens can be transferred technically on a blockchain infrastructure. Issuing utility tokens will not trigger such application, as long as their main purpose is providing access to a non-financial application of the blockchain technology. Asset tokens are not deemed a means of payment under the AMLA. FINMA clarifies that the application of the AMLA will not only be triggered by an exchange of a cryptocurrency against a fiat currency, but also by an exchange against a different cryptocurrency.

Rights granted in the pre-sale phase are considered as securities by FINMA if they are standardised and suitable for mass standardised trading. If so, they are not subject to AML regulations.

17 https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/ (in four languages: French, German, Italian and English).

On 8 January 2018, the Crypto Valley Association, an independent, government-supported association established to support fintech institutions in the canton of Zug, published a General Code of Conduct that aims to subject its members to a minimum standard with regards to transparency and information when conducting an ICO. The minimum standard entails providing information on technical features, financial situation, the management team involved and the involved risks and respective compliance procedures (e.g., KYC process). In addition, members should ensure that pre-deployment and deployment are audited by an independent auditor. It is not yet certain whether these standards will all prevail. On 21 September 2018, the Swiss Bankers Association published guidelines on the opening of corporate accounts for blockchain companies (with and without ICOs), which aim to promote a diverse fintech ecosystem, at the same time securing the integrity of the Swiss financial market.

There is no separate tax regime applicable to digital currencies and tokens. Cryptocurrencies and tokens are therefore taxed like any other traditional investment vehicle. However, on most tokens, no VAT, no issuing tax and no withholding tax is levied when the token is issued, subject to certain exceptions. Swiss residents do not pay taxes on capital gains of privately held assets.

Tokens may be offered to Swiss residents from outside of Switzerland, but are subject to similar requirements as applicable to tokens issued in Switzerland, namely, they may not qualify as derivative products, security tokens may not be offered by a third party in a professional capacity and tokens that are similar to bonds or shares may trigger prospectus requirements.

VI OTHER NEW BUSINESS MODELS

Self-executing contracts are generally permitted by Swiss law, as long as the essential terms and conditions of the contract are agreed upon by both parties. Fully automated investment processes such as robo-advisers are not *per se* prohibited by Swiss law, as long as the clients concerned are informed and agreed respectively.

A number of insurance companies experiment with new insurtech products, for example, in the field of claims management, customer handling or AI applications in risk assessment. The international Blockchain Insurance Industry Initiative B3i is domiciled in Zurich.

VII INTELLECTUAL PROPERTY AND DATA PROTECTION

Fintech and software may be protected under patent law or copyright law, depending on the specific details of the technology or software. Unlike in the EU, there is no specific protection of the creator's rights in a database. However, databases and software may be protected under copyright law, if and to the extent they are intellectual creations with individual character with regard to their selection and arrangement. To qualify for patent law protection, a technology or software must be an invention that is new and applicable in the industry, and that solves a technical problem (which is usually not the case in standard software). A technical reproduction process of someone else's market-ready work is prohibited.[18]

18 Article 5 Lit. c UCA.

If an employee creates a computer program in the course of discharging professional duties or fulfilling contractual obligations, the employer alone shall be entitled to exercise the exclusive rights of use. Inventions and designs produced by the employee alone or in collaboration with others in the course of his or her work for the employer and in performance of his or her contractual obligations belong to the employer, whether or not they may be protected. By written agreement, the employer may reserve the right to acquire inventions and designs produced by the employee in the course of his or her work for the employer but not in performance of his or her contractual obligations. Business models, as a rule, cannot be subject to intellectual property rights under Swiss law.

Under the Swiss Data Protection Act, protected data are not only data relating to persons but equally data relating to legal entities. Personal data must be protected against unauthorised processing by adequate technical and organisational measures. Processing of data is any operation with personal data, irrespective of the means applied and the procedure, and in particular the collection, storage, use, revision, disclosure, archiving or destruction of data. Thus, merely providing information or comparing products on a website may fall within the scope of Swiss data protection law (unless the data are public). In addition, such a comparison may be considered unfair under the UCA if the services, prices or business situation were reduced by incorrect, misleading or unnecessarily infringing statements. The storage of personal data on a server in Switzerland may be sufficient to trigger application of Swiss data protection law.

Digital profiling may be considered as a personality profile or even include sensitive personal data within the meaning of the data protection act; in other words, a collection of data that permits an assessment of essential characteristics of the personality of a natural person. Consent must be expressly given before processing such data and personality profiles (and sensitive personal data) must not be disclosed to a third party without justification. In addition, the data processor must inform the person concerned of:

a the controller of the data file;
b the purpose of the processing; and
c the categories of data recipients (if disclosure were planned).

The Swiss Data Protection Act is under review and it is expected that a revised Act aligned to the EU General Data Protection Regulation will become effective by 2021.

VIII YEAR IN REVIEW

The past 18 months were an intense phase for Swiss fintech regulations.

In January 2018, the Swiss State Secretariat for International Financial Matters established a blockchain/ICO working group. Also in January 2018, the private Crypto Valley Associations proposed a first Swiss Code of Conduct for ICOs, proposing detailed and extensive information requirements for enterprises conducting an ICO and suggesting that each stage of an ICO be independently audited. On 16 February 2018, FINMA published its Guidelines for ICOs, providing a regulatory framework to classify tokens and giving indications as to their treatment under AML laws. Furthermore, several cantonal tax administrations issued guidelines on how they will assess bitcoins for tax purposes.

While the ICO boom of 2017 slowed down considerably, in 2018 infrastructure projects (crypto-brokers, trading places, wallet and storage providers) started to dominate the scene. In June 2018, the first Swiss crypto-trading place SCX took up operations.

On 21 September 2018, the Swiss Bankers Association Guidelines on opening corporate accounts for blockchain companies were published. As various projects had problems finding a bank that was willing to open a corporate account, in particular to accept the proceeds of an ICO, this was a welcome confirmation of the industry's support for the new fintech sector. In October 2018, a report of the interdepartmental coordination-group to fight money laundering and terrorism financing was published and found that, up to the date of the report, no cases of money laundering by way of using cryptoassets in Switzerland has become known. The report was cautious about strengthening the AML rules, as Swiss AML rules already cover more aspects than, for example, EU rules. However, the national platform Cyberboard, bringing together law enforcement officials from all over Switzerland, was considered to be an important tool. In the revised Finma-AML-Ordinance (changes as of 20 June 2018), additional duties of review were introduced for issuers of means of payment (such as payment tokens); the revised ordinance is expected to become effective on 1 January 2020.

In December 2018, the long-awaited report of the Swiss Federal Council, the Swiss government, on the legal basis for distributed leger technology and blockchain in Switzerland, with a focus on applications cases in the finance sector, gave a comprehensive overview of the current legal regime and proposed changes to it. In summary, the report advocated not introducing a separate blockchain act, but rather to adapt existing laws to abolish certain aspects that may hinder the new technologies. A first proposal for such changes was published on 22 March 2019 (the Federal Act on adapting the Federal law to developments of the DLT). Interested parties may now send comments until summer 2019 and thereafter, the Federal Council will draft its formal proposal to parliament.

The draft focuses on security tokens which are to be regulated as intermediated securities under security law, debt enforcement law and international private law. Furthermore, a new financial market infrastructure is proposed, the 'DLT trading system', which may combine the functions of a trading plattform, a depositary and a payment system (but not as a central counterparty).

IX OUTLOOK AND CONCLUSIONS

It is expected that the act on establishing a legal and a distribution framework for a generally accepted digital identity may be in a final form by the end of 2019.

The draft of the new Data Protection Act published in 2017 is still on hold. It is expected that it will not be discussed in parliament prior to the end of 2019 and will not become effective in 2020.

The first proposal of the Federal Act on adapting the Federal law to developments of distributed ledger technology (DLT) will be discussed in 2019 and it can be expected that a final proposal of the government will be submitted to parliament by the end of 2019.

Hence, while the changes to Federal law to better adapt it to DLT may take some time, there are numerous private and public initiatives that focus on establishing wallet providers, trading platforms and various other projects in Switzerland. Among others, the Swiss FinTech Innovation Lab at Zurich University brings together researchers from banking and finance, business informatics, management, social sciences, etc. The university further announced that it intends to establish 18 new chairs for digitalisation topics. In addition, private promotors are about to establish sample standardised documents to further facilitate the use of the new technologies.

A focus in 2019 will clearly be on asset tokens; the first projects to tokenise shares and bonds are already operative, and it is hoped that this will enable small and medium-sized companies to tap the international financial markets much more efficiently. At the same time, there are various insurtech projects, projects to facilitate client onboarding (regtech) and projects to use artificial intelligence in the financial sector. Hence, even though the 'crypto boom' of 2017 may be over, the future has only started for the Swiss financial industry and the environment will remain very dynamic and can also count on continued support by the Swiss and Cantonal governments.

Appendix 1

ABOUT THE AUTHORS

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A partner at Niederer Kraft Frey, Dr Thomas A Frick holds degrees in Swiss and European law and general history and is admitted to the Swiss Bar. For over 20 years he has advised banks, securities traders, other financial intermediaries and start-ups on various legal and regulatory issues. He advises numerous fintech and other finance projects (ICOs, STOs, crypto-brokers, crowd-lending, asset management, crypto-fund projects, exchange projects, payment systems and others) and is actively involved both as a board member in banks and as a business angel in startup companies. He frequently gives presentations on Swiss fintech regulations, and is a regular publisher on the subject and a lecturer on banking and finance law in Zurich University's LLM programme.

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