



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Switzerland: Fintech (2nd edition)

This country-specific Q&A provides an overview of the legal framework and key issues surrounding fintech law in Switzerland.

This Q&A is part of the global guide to Fintech.

For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/fintech-2nd-edition>

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1. **What are the sources of payments law in your jurisdiction?**

Payment systems are defined in and governed by the Swiss Financial Infrastructure Act (FinfraG) and by rules in the National Bank Act, the Banking Act (BA) and the Anti-Money Laundering Act (AMLA). Payment systems require a license only if this is necessary for the protection of the participants or for securing the functioning of the financial markets; hence, the regulatory framework for payment systems may be complex.

2. **Can payment services be provided by non-banks, and if so on what conditions?**

A payment system requires a banking license if it accepts deposits from the public on a

regular basis; if deposits are made only for future purchases of goods or services, no interest is paid and the maximum amount of the customer claims is Swiss francs 3'000 (USD 3'000), they are not deemed deposits that require a banking license; the same applies if a licensed bank guarantees the deposits.

If a payment system is deemed to be of systemic relevance, or if Finma is of the opinion that supervision is required for the protection of the participants of the payment system, Finma can in its discretion require a payment system to obtain a license under the FinfraG. For the time being, Finma does not subject normal payment systems to such license requirement. Payment systems of systemic relevance are furthermore subject to reporting obligations to the Swiss National Bank (SNB). SNB has the competence to subject also foreign payment systems which are of systemic relevance to Switzerland to its supervision.

Hence, most payment systems are not subject to prudential supervision or license requirements. However, all payment systems that enable third parties to transfer values need to comply with anti-money laundering (AML) rules and become either a member of a so-called self-regulatory organisation (SRO) or direct supervision by Finma for AML purposes.

3. What are the most popular payment methods and payment instruments in your jurisdiction?

A study made in 2017 by the SNB showed that the most popular means of payment of private persons in Switzerland continues to be cash (70% of transactions, 45% of value). Of electronic means of payment, the most often used is the debit card (ec card, Postfinance), followed by credit cards. Professional payments of finance companies are dominated by the Swiss Interbank Clearing (SIC). Payment apps are not yet widely used, due to competition between different schemes offered. Only recently, a uniform solution was offered by all major banks, under the brand of TWINT. Apple pay and paypal are often used for online purchases.

4. What is the status of open banking in your jurisdiction (i.e. access to banks' transaction data and push-payment functionality by third party service providers)? Is it mandated by law, if so to which entities, and what is state of implementation in practice?

Switzerland not being a member of the European Union (EU) or the European Economic Area (EEA), it did not implement the EU Payment Services Directive 2 (PSD2). Swiss banks are sceptical and do not open up interfaces to their client data. Banks are criticised for that approach, in particular by fintech start-ups providing products based on having access to such data.

5. How does the regulation of data in your jurisdiction impact on the provision of financial services to consumers and businesses?

Swiss banking secrecy continues to be an important element of providing financial services in Switzerland. Although Switzerland introduced the Automated Information Exchange (AIA) with a great number of other countries and opened up its banks to direct inspections by foreign regulators (in addition to the normal routes of judicial assistance), client data secrecy is still taken seriously. There is no automatic reporting of client data to state authorities (outside of the AIA). Secrecy provisions include art. 47 Banking Act (the well-known banking secrecy), similar provisions in the Stock Exchange and Collective Investment Schemes Acts, rules in the Civil Code and in the Code of Obligations, provisions in the Criminal Code and in the Data Protection Act. A peculiarity of Swiss data protection law is that today, it still not only protects persons but equally applies to legal entities, which is why data transfers even into the EU may be subject to limitations.

6. What are regulators in your jurisdiction doing to encourage innovation in the financial sector? Are there any initiatives such

as sandboxes, or special regulatory conditions for fintechs?

Already in 2016, Finma issued a guideline permitting video- and online identification for AML purposes in an account opening process. Finma furthermore adapted an existing circular to make it technology neutral by permitting asset managers to enter into digital asset management agreements (instead of agreements in writing). Finma also established a dedicated helpdesk for fintech questions.

In 2017, the ordinance to the BA was changed: Prior to that revision, banking license requirements were easily triggered, e.g. if a fintech company was deemed to be accepting funds from the public on a commercial basis or if a fintech company lent to borrowers in excess of 500 million Swiss francs (approx. USD500 million) while refinancing itself with more than five banks not associated with the fintech company. Fulfilling all prerequisites of a regular banking license however is unreasonably burdensome for the average fintech company: not only would it have to meet capital requirements of more than 20 million Swiss francs (approx. USD20 million), but it would also have to comply with high corporate governance and regulatory standards. The revision brought two changes:

First, the time-period during which a financial intermediary may hold funds from third parties on its own accounts for the purpose of settling client transactions without being deemed to have accepted funds has been extended from seven days (according to the current practice of Finma) to 60 days. Therefore, if the settlement occurs during this 60 days-period, no banking license needs to be obtained. Crowd-funding platforms may capitalize on this exemption in particular, since it allows to route the funds through the platform. Similar advantages result for payment service providers. However, currency traders are excluded from invoking aforementioned exemption.

Second, the rule whereby a banking license is required whenever (i) either funds of more than 20 investors are actually held or (ii) the enterprise publicly announces that it is willing to accept such funds (regardless of the actual number of investors) was amended. Holding client funds (of more than 20 investors and for a period longer than 60 days) does now no longer trigger banking licensing requirements (as it is not deemed to be acting "on a commercial basis") if (i) the funds do not exceed one million Swiss francs (approx. USD1 million), (ii) the funds are neither invested nor interest bearing (except in the cases outlined below), and (iii) the depositors have been



informed in writing or otherwise in text form prior to making the deposits that the funds are not covered by the Swiss depositors protection regime and that the institution (here: the fintech firm) is not supervised by Finma. In case the person accepting such funds is primarily engaged in commercial/industrial (i.e. not financial) activities and uses the accepted funds to finance such activities, the requirement that the funds must neither be interest bearing nor invested does not apply. The new rule is unofficially termed "sandbox" and aims to give space for developing fintech solutions without their being subjected to (prudential) supervision by the Swiss regulator. In case that aforementioned threshold is being exceeded, the institution must notify Finma within 10 days and file an application for a (regular) banking license within 30 days. Finma may prohibit the institution from accepting additional funds from the public until a banking license is granted, should Finma consider this necessary taking into account market and customer protection.

In addition, in 2019 a change of the BA itself became effective: By this change, Switzerland introduced a "banking license light". The amendment to BA was headed "promoting innovation" and set forth, among others, that an entity does not qualify as a bank (even if primarily engaged in the financial sector accepting funds from the public on a commercial basis or publicly offering such services) if such acceptance of funds is limited to the amount of 100 million Swiss francs (approx. USD100 million) and the assets are neither invested nor interest bearing. Instead, the BA applies *mutatis mutandis* to such entities, potentially going along with lower requirements as regards accounting standards, auditing and depositor protection. Hence, Switzerland has already taken a number of steps to establish a "banking license light" and a sandbox.

Finma as the financial markets regulator was the first supervisory authority to issue guidelines for initial coin offerings (or token generation events, commonly known as ICOs) (see question 14 below). These guidelines were recently amended by explanations on how Finma looks at security token offerings (STOs), and on the AML treatment of digital assets.

The Swiss government and industry have furthermore initiated the "digital Switzerland" initiative, bringing together a great number of interested parties to further the ecosystem and the regulatory framework for the digitalization of Switzerland. The already existing and more specialized fintech ecosystem, which by itself comprises a variety of associations, meetups and conferences such as the blockchain taskforce, will

also profit from that initiative. In general, it is foreseen that no special laws will be drafted for the Blockchain, distributed ledger or crypto economy, but that existing laws will be revised to render them technology neutral.

7. Do you foresee any imminent risks to the growth of the fintech market in your jurisdiction?

In 2017, Switzerland was the second-biggest ICO location (after the US). Recent statistics show that the number of new ICOs in Switzerland has reduced significantly. This may be due to the fact that most ICOs are done offshore, today, that Switzerland was one of the first jurisdictions to have introduced a regulatory framework for ICOS but possibly also to the fact that there were high-profile disputes, such as in the Tezos or the Envion cases. On the other hand, the crypto-infrastructure was expanded significantly with a number of crypto-brokers and crypto-exchanges. There continues to be a high number of fintech start-ups and inhouse fintech projects due to the strong Swiss financial market and the continuing political support for such projects.

Swiss banks participate in the R3 initiative building the Corda platform, the corresponding initiative in the insurance industry, the B3i, which aims to explore the potential of using distributed ledger technology in the insurance industry, is based in Zurich, Switzerland. The Swiss National Bank (SNB) and the Bank for International Settlements (BIS) have signed an Operational Agreement on the BIS Innovation Hub Centre in Switzerland in October 2019.

Hence, the Swiss fintech market is bound to continue to grow, in spite of the fact that the ICO hype of 2017 may be history.

8. What tax incentives exist in your jurisdiction to encourage fintech investment?

There are no tax incentives specially targeted at fintech investment. Switzerland remains overall a favourable business location from a tax perspective, with competition between cantonal tax regimes ensuring that the overall tax rate remains competitive.

Token issuances are usually not subject to tax. Start-ups may profit from more lenient taxation in many parts of Switzerland, e.g. by being taxed only on net asset value until representative business results are available.

9. Which areas of fintech are attracting investment in your jurisdiction, and at what level (Series A, Series B etc)?

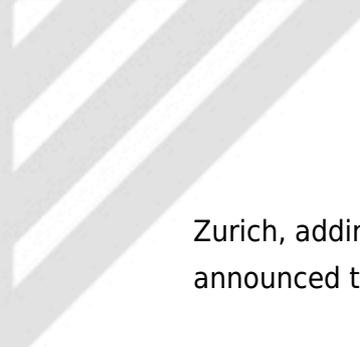
There was considerable progress in the venture capital environment of fintech start-ups, beginning in 2017. There are today a number of venture capital funds focused on blockchain and fintech projects. A significant number of Swiss banks, insurance companies and other major Swiss market participants set up the Swiss Entrepreneurs Foundation, a fund with a target capitalization of Swiss francs 500 million (USD 500 million). The Swiss financial infrastructure provider SIX also announced the setting up of a Swiss francs 50 million (USD 50 Million) fund for the promotion of innovation in the financial industry. The number of rounds and the relevant figures are comparable for seed, series A and series B rounds. In addition, there are a number of incubators, accelerators and business angel clubs supporting the fintech scene.

10. If a fintech entrepreneur was looking for a jurisdiction in which to begin operations, why would it choose yours?

Switzerland is a stable country with a substantial and open economy in the middle of Europe but not in the EU; the fintech sector enjoys strong support by the business community. The country has a strong and mature financial market and strong service industries supporting the fintech initiative.

The federal government is very supportive of fintech and the immediate regulator Finma is recognised as competent and supportive. Furthermore, numerous networks were formed in the business community.

There is also strong support on the tech side: Google, IBM, Thomson Reuters, ETH (Federal Institute of Technology) all established research laboratories in and around



Zurich, adding to the knowledge and technical innovation network. Zurich University announced that it will create 18 new chairs for digital innovation studies.

The tax environment(s) are business friendly and tax rulings are available; flexible and employer friendly labour and corporate laws complete the picture.

This favourable environment is stable, as there is competition between cantons and universities to stay ahead of the curve and pressure by start-ups on established enterprises. Hence, Switzerland is and will remain a business-friendly and supportive environment for fintech companies.

- 11. Access to talent is often cited as a key issue for fintechs - are there any immigration rules in your jurisdiction which would help or hinder that access, whether in force now or imminently? For instance, are quotas systems/immigration caps in place in your jurisdiction and how are they determined?**

According to bilateral agreements between Switzerland and the EU, there are no quotas for citizens of EU member states and such citizens have a right to a work permit in Switzerland. For third party nationals, there are quotas and various permits that may be issued, from 90 day permits to full-year permits; such persons taking up employment in Switzerland need a permit issued prior to their employment. As a rule, any work of more than eight days per calendar year performed by a foreign national in Switzerland requires a prior work permit or online registration. Switzerland already negotiated an agreement with the U.K. that in case of a hard Brexit, U.K. citizens will continue to profit from preferential treatment in Switzerland.

- 12. If there are gaps in access to talent, are regulators looking to fill these and if so how? How much impact does the fintech industry**

have on influencing immigration policy in your jurisdiction?

As a rule, companies requiring specialists will receive the necessary work permits. There may be temporary gaps in certain cantons in particular for IT personnel if these do not qualify (and are not paid as) specialists. As there are a number of industries competing for this talent pool, the fintech industry does not have a special influence to obtain quotas. However, there are many Swiss and EU/EEA IT specialists available for which there are not obstacles to employ them.

13. What protections can a fintech use in your jurisdiction to protect its intellectual property?

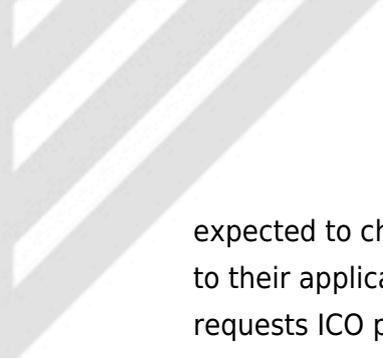
Switzerland is a research and innovation centre. Fintech innovations are protectable primarily under copyright and patent laws. Software is usually protected under copyright law as computer programs are not deemed technical solutions per se. A patent may, however, be available if the computer-implemented innovation solves a technical problem. Copyright protection does not extend to ideas but only protects the individual format and not the content. Algorithms are not subject to copyright protection.

Additional protection may be available by design and trademark registrations which can both protect two or three-dimensional forms.

Fintech innovations may also be protected as manufacturing or trade secrets, the breach of which e.g. by employees or mandatees is subject to criminal sanctions. Non-disclosure agreements are frequently used in particular in the initial phase of a fintech project, when the underlying ideas are presented to investors.

14. How are initial coin offerings treated in your jurisdiction? Do you foresee any change in this over the next 12-24 months?

Finma was the first regulator to issue detailed guidelines on ICOs; these are not



expected to change in the upcoming 12 to 24 months but were specified with respect to their applicability to STOs. Finma accepts ICOs to be legal in Switzerland; however, it requests ICO projects to be submitted to its fintech desk prior to beginning the presale and if not, will transfer the file to its enforcement desk which will proceed to investigate the ICO. Finma distinguishes three different classes of tokens, with differing regulatory treatment:

A cryptocurrency token can only be issued by a company that is an SRO member (or subject to Finma supervision) and is subject to AML rules.

A utility token can be issued without license or AML checks, provided the token is operative at the time of issuance.

A security token can be issued subject to the rules applicable to the respective security, which may mean it is subject to prospectus requirements.

Finally, in case a token has characteristics of more than one class, it needs to comply with the requirement of each such class (hybrid token).

Entitlements to tokens issued prior to the ICO (e.g. in the presale) will be qualified as security rights.

15. **Are you aware of any live blockchain projects (beyond proof of concept) in your jurisdiction and if so in what areas?**

There are a number of live blockchain projects; the majority is in the financial sector, namely in the token based economy. A number of crypto currencies was issued from Switzerland. Furthermore several utility tokens. In addition, the food and pharmaceutical industry are applying blockchain technology to monitor shipping. In autumn 2019, the first two banking licenses were granted to crypto-banks.

16. To what extent are you aware of artificial intelligence already being used in the financial sector in your jurisdiction, and do you think regulation will impede or encourage its further use?

Artificial intelligence (AI) is already used in robo advisory as well as in various compliance projects (e.g. AML, on-boarding of clients) and in document reviews. Regulation will not impede its use; rather, the approach to make regulation technology neutral will encourage its use.

17. Insurtech is generally thought to be developing but some way behind other areas of fintech such as payments. Is there much insurtech business in your jurisdiction and if so what form does it generally take?

There are several start-ups dedicated to insurtech projects; furthermore, a number of insurance companies have embraced insurtech. B3i, an international insurance company consortium which aims to explore the potential of using distributed ledger technology in the insurance industry, is based in Zurich, Switzerland. The focus of many projects is on digital insurance management solutions for customers, on digital on-boarding and on consolidation of various policies on one app.

18. Are there any areas of fintech that are particularly strong in your jurisdiction?

A study of the Lucerne University of Applied Sciences and Arts about fintech in Switzerland in 2018 concluded that there are significant numbers of projects in the field of investment management and banking infrastructure, followed by projects in analytics, DLT, deposits and lending, and payments. In 2017, Switzerland became known in particular as an ICO location. For 2019, security tokens became a key feature of the fintech scene; for 2020, it is expected that infrastructure projects will dominate the scene.

19. **What is the status of collaboration vs disruption in your jurisdiction as between fintechs and incumbent financial institutions?**

While at the beginning, many expected fintech start-ups to disrupt the market and to threaten established players, today start-ups tend rather to co-operate with existing financial institutions. This trend is expected to continue, as the existing financial institutions have the customer relationships which many of the start-up products need. Many financial institutions have already bought start-ups or have their own research development departments.

20. **To what extent are the banks and other incumbent financial institutions in your jurisdiction carrying out their own fintech development / innovation programmes?**

The major banks and insurance companies have their own research and development departments, but also work together with start-ups. Smaller banks entered into formal co-operation with fintech startups or buy their products.

21. **Are there any strong examples of disruption through fintech in your jurisdiction?**

Disruption occurred with the ICO boom of 2017; ICOs became a major competitor to private equity funding; the same applied with respect to crowdfunding platforms. It may continue with the establishment of security tokens as a fully accepted alternative to the listing of securities at a stock exchange. Disruptive to a certain degree were automation of derivative products (such as the Leontec model) or robo advisors (there are about ten in Switzerland, although not yet very successful), although often there will be a combination of models (robo advisors supporting the relationship managers of banks) and not a full disruption.

