Fintech
2022

Contributing editors
Angus McLean and Penny Miller

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Simmons & Simmons LLP

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Fintech*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Mexico and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Angus McLean and Penny Miller of Simmons & Simmons LLP, for their continued assistance with this volume.

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Switzerland

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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

1 | What is the general state of fintech innovation in your jurisdiction?

Switzerland strongly supports innovation both at the government and corporate level. This includes fintech innovation. The country has a strong and mature financial market and strong service industries that support such initiatives. Well-known internationally is the Crypto Valley, a fintech hub focused on crypto offerings located in Zug, a small canton close to the financial centre of Zurich. Google, IBM, Disney, Thomson Reuters and the Federal Institute of Technology ETH have all established research laboratories in and around Zurich, adding to the technical innovation network. Zurich University is in the process of creating 18 new chairs for digital innovation studies; Zurich University also intends to further enhance its research on artificial intelligence. There are numerous companies focusing on digital offerings, specialised ones such as Swissquote, Temenos and Avaloq, and others providing IT support and IT-focused financial services. In addition, major Swiss banks such as UBS and Credit Suisse both have fintech innovation laboratories. Banks focused on crypto offerings (eg, SEBA and Sygnum) received a banking licence in summer 2019; other projects are currently aiming to set up trading platforms and exchanges (eg, SIX Swiss Exchange and its SDX project) and to obtain a licence from the Financial Market Supervisory Authority (FINMA). FINMA also recently granted the first of the new fintech licences.

Government and regulatory support

2 | Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

There are numerous initiatives by government bodies and regulators to provide support to financial innovation. The most comprehensive one is the Digital Switzerland initiative that coordinates various private initiatives and provides government support to them. FINMA set up a special fintech desk as a competence centre for fintech applications and enquiries. Through this desk, FINMA issued, for instance, guidelines for initial coin offerings (ICOs) in 2018 and confirmed its willingness to review submissions for ICOs and provide clearance letters for these offerings confirming that an ICO will not be in breach of Swiss regulations. Through the state agency Innosuisse, the Swiss Federation supports technology-based innovation in Swiss enterprises. Innosuisse offers coaching, thereby helping start-ups to raise capital.

Furthermore, the government initiated various changes to Swiss law. Among others, relevant rules for the on-boarding of clients or for entering into asset management agreements were adapted to render them technology neutral (ie, to enable online on-boarding and online

conclusion of such contracts). Various other changes to the relevant laws were already made or initiated to further enhance the fintech ecosystem. A special DLT Act entered into force in part in February 2021, and will further enter into force in the summer of 2021. The Act is, however, not stand-alone legislation but amends existing laws to adapt them better to the crypto-world.

FINANCIAL REGULATION

Regulatory bodies

3 | Which bodies regulate the provision of fintech products and services?

The provision of fintech products and services is governed by the general laws and regulations applicable to the financial market, which in general is supervised by the Financial Market Supervisory Authority (FINMA). FINMA regulates the provision of these products and services in more detail by issuing circulars and guidelines, such as the guideline for initial coin offerings (ICOs). FINMA is the competent supervisory authority for banks, insurance companies and asset managers managing assets of collective investment schemes.

Financial intermediaries, which were not prudentially supervised prior to 1 January 2020, became subject to prudential supervision (in particular, asset managers). They must join a self-regulatory organisation (SRO) for the purpose of anti-money laundering (AML) compliance and one of the newly set up special supervisory bodies for asset managers. These in turn are supervised by FINMA but are privately run organisations.

Finally, certain ICOs were made by foundations domiciled in Switzerland and these foundations are supervised by separate supervisory authorities at the communal, cantonal and federal level; foundations set up for the purpose of making an ICO are usually supervised by the Federal Authority for Foundation Supervision.

Regulated activities

4 | Which activities trigger a licensing requirement in your jurisdiction?

On its website (www.finma.ch), FINMA provides an overview of activities that may trigger a licensing requirement. Fintech companies are particularly likely to fall within the scope of the Banking Act, the Financial Institutions Act, the Financial Market Infrastructure Act (FMIA) and the Anti-money Laundering Act (AMLA).

Anyone who accepts deposits from the public on a commercial basis is subject to banking licence requirements. This is the case if either deposits of more than 20 investors are actually held or if the entity publicly announces to a non-limited number of persons that it is willing to accept these deposits. Bond issues do not qualify as deposits and capital contributions that do not entail a repayment obligation also

do not qualify as deposits. Since 1 August 2017, the holding of client funds no longer triggers banking licence requirements if the funds do not at any time exceed 1 million Swiss francs, the funds are neither reinvested nor interest-bearing and the depositors have been informed in writing prior to making the deposits that their funds are not covered by the Swiss depositor protection regime and that the institution is not supervised by FINMA. On 1 January 2019, a special licence was introduced whereby undertakings accepting deposits from the public of up to 100 million Swiss francs may qualify for a banking licence light, a licence that subject these undertakings to rules less stringent than the rules applicable to banks, providing no interest is paid on such deposits and the funds are not reinvested (fintech licence).

An entity that commercially buys and sells securities on the primary market for its own account for short-term resale or for the account of third parties, which offers them publicly on the primary market or create or publicly offers derivatives, may require a securities house licence. The term 'securities' is now defined in the FMIA and is understood as meaning 'standardised certified and uncertified securities, derivatives and intermediated securities, which are suitable for mass trading'. Further clarification is provided by the ordinance on financial market infrastructures and market conduct in securities and derivatives trading, which clarifies that only such securities that 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, will fall under the regulation.

While advising on investments will not be subject to licence requirements, asset management based on a power of attorney subjects the asset manager to the obligation to join a SRO, to comply with the relevant rules of the Swiss AMLA and to obtain a licence from FINMA. AMLA regulations also extend to persons who carry out credit transactions, such as consumer loans or mortgages, factoring, commercial financing or financial leasing, and persons who provide services relating to payment transactions.

Payment systems may under certain conditions require a licence under the FMIA.

Consumer lending

5 | Is consumer lending regulated in your jurisdiction?

Consumer lending activities will require membership in a SRO and compliance with the applicable AML rules. Furthermore, consumer lending may fall under the Consumer Credit Act: a consumer lending company must obtain a licence (from a cantonal authority, unless it holds a banking licence), must hold own assets in the amount of 8 per cent of the issued consumer loans and is subject to various rules on providing transparency on the terms of the consumer loan and the obligation to verify the creditworthiness of the counterparty.

Secondary market loan trading

6 | Are there restrictions on trading loans in the secondary market in your jurisdiction?

There is no licence requirement for trading loans in the secondary market. However, if an investment company is buying and selling securities for their own account with the intent of reselling them within a short time period or for the account of third parties, these companies must obtain a securities house licence from FINMA.

Collective investment schemes

7 | Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

As a rule, peer-to-peer lenders, marketplace lenders or crowdfunding platforms will not fall under the rules applicable to collective investment schemes. Collective investment schemes and companies managing collective investment schemes are subject to prudential supervision by FINMA. Collective investment schemes are highly regulated in Switzerland and subject to investment and borrowing restrictions as well as to strict rules applicable to the sales of its units in or from Switzerland. No specific regulations apply for fintech companies.

There is a project pending for a change of law, which could introduce a non-licensed fund structure for professional investors only.

Alternative investment funds

8 | Are managers of alternative investment funds regulated?

Switzerland not being a member state of the European Union, the Alternative Investment Fund Managers Directive is not applicable. As a rule, an asset manager domiciled in Switzerland of a Swiss or foreign collective investment scheme requires a licence from FINMA. However, if the investment fund is open to qualified investors only, the asset manager may not fall under the licence requirement if the assets under management do not exceed 100 million Swiss francs, or if the assets do not exceed 500 million Swiss francs, provided that the portfolio is not leveraged and the investors do not have a redemption right for a period of five years, or if the investor is part of the same financial group as the asset manager.

Peer-to-peer and marketplace lending

9 | Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

If the fintech company organising the marketplace is acting as a mere marketplace and does not accept or forward any funds, it will not be subject to any specific regulation. However, if the fintech organising the marketplace or the peer-to-peer lending accepts funds or controls the forwarding of these funds to another party of the marketplace, it will be subject to AML regulations and will need to join an SRO to comply with the AML regulations.

Crowdfunding

10 | Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is not specifically regulated under Swiss law, but FINMA issued a fact sheet outlining the applicable rules. Therefore, the general rules apply to crowdfunding systems. As a rule, crowdfunding platforms will not be subject to prudential supervision. If the crowdfunding platform only organises the funding but does not control the flow of funds, it will not be subject to licensing requirements. If the crowdfunding platform accepts funds and forwards these funds to the recipient within a time period of up to a maximum of 60 days without paying interest on the funds, the crowdfunding platform will be subject to AML regulations and will need to become a member of an SRO. If a crowdfunding platform holds funds for a period longer than 60 days, it may require a fintech licence under the Banking Act, if the funds held do not exceed the amount of 100 million Swiss francs. If the funds held exceed this amount or if interest is paid on the amount held, a banking licence will be required. Not only the platform may require a licence, but also

the project developer, if it accepts deposits or advertises that it will accept deposits.

Invoice trading

11 | Describe any specific regulation of invoice trading in your jurisdiction.

Invoice trading and factoring is not specifically regulated in Switzerland and does not require a prudential licence. However, trading in invoices qualifies the fintech company as a financial intermediary and the fintech company will have to comply with AML regulations and join an SRO.

Payment services

12 | Are payment services regulated in your jurisdiction?

Switzerland not being a member of the European Union, the European Payment Services Directive 2 (PSD2) does not apply and Switzerland does not have a corresponding regulation. Therefore, no prudential licence is required for payment services. However, any provider of payment services will need to comply with AML rules and will have to join an SRO. 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 a payment system, FINMA can at its discretion require a payment system to obtain a licence under the FMIA and such systems will furthermore be subject to reporting obligations to the Swiss National Bank. The Swiss National Bank has the competence to subject foreign payment systems that are of systemic relevance to Switzerland to its supervision. However, most payment systems are not subject to prudential supervision or licence requirements. FINMA declared that the LIBRA stablecoin, Facebook's project, would be of systemic relevance.

Open banking

13 | Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

The PSD2 does not apply in Switzerland and no equivalent regulation exists. Swiss banks are sceptical and, at the time of writing, do not open up interfaces to their client data. However, as banks are criticised for that approach and as banks usually also provide cross-border services, it is expected that certain banks will in the future start to apply the PSD2 rules voluntarily by granting third parties access to certain data, subject to customer consent.

Robo-advice

14 | Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

There are several robo-advisers active on the Swiss market. The rules applicable to them are the same as those that apply to normal asset managers.

Insurance products

15 | Do fintech companies that sell or market insurance products in your jurisdiction need to be regulated?

Insurance companies operating in Switzerland must obtain a licence for their specific activities from FINMA. As the sale and marketing of insurance products is highly regulated, any marketing of these products (including cross-border marketing into Switzerland) needs to be evaluated in detail prior to any marketing activities.

Credit references

16 | Are there any restrictions on providing credit references or credit information services in your jurisdiction?

There is no general licensing requirement for providing credit references or credit information services. However, any company providing this information must comply with the Swiss Federal Act on Data Protection, which applies not only to natural persons but also to legal entities. Furthermore, the gathering of information from non-public sources may qualify as activity of private detective, which is subject to licensing requirements in certain cantons. If done on a cross-border basis, this activity may trigger reporting obligations to the Swiss Foreign Department under the Federal Act on private Security Services Abroad.

CROSS-BORDER REGULATION

Passporting

17 | Can regulated activities be passported into your jurisdiction?

No passporting of regulated activities into Switzerland is possible.

Requirement for a local presence

18 | Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

As a rule, a licence will only be granted to a company established in Switzerland (ie, if it has local presence either in the form of a company or in the form of a branch of a foreign legal entity). Product offerings, however, are possible on a cross-border basis provided that the products (such as investment funds) are approved in Switzerland. While the distribution of insurance products, collective investment schemes, derivatives and securities is regulated, general banking services may be offered by foreign banks in Switzerland without licensing requirements; however, since 1 January 2020, client advisers working for foreign financial service providers need to register in a Swiss advisory register. Exempt from this are client advisers working for banks, securities houses and asset managers and client advisers working for other foreign prudentially supervised financial institutions if they only advice professional or institutional clients.

When marketing financial products, such as investment funds and structured products, the local Swiss rules on the marketing of such products must be complied with (eg, prospectus requirements under Swiss law).

SALES AND MARKETING

Restrictions

19 | What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

When marketing financial products, such as investment funds and structured products, the local Swiss rules on the marketing of such products must be complied with (eg, prospectus requirements under Swiss law).

CHANGE OF CONTROL

Notification and consent

20 | Describe any rules relating to notification or consent requirements if a regulated business changes control.

If a prudentially supervised legal entity changes control, the legal entity and the new controlling shareholder must obtain an additional licence

from the Financial Market Supervisory Authority. The same applies if 10 per cent or more of the capital or of the voting rights in a foreign-controlled prudentially supervised legal entity are transferred. In the application, full information must be provided on the new shareholder and on the persons controlling this new shareholder up to the ultimate beneficial owner.

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

21 | Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There are no specific rules applicable to fintech companies. All Swiss legal entities and persons are subject to the anti-bribery rules of the Swiss Criminal Code and need to comply with these provisions. For prudentially supervised companies, compliance with such anti-bribery rules is part of the supervisory concept and any breaching of these rules may endanger the licence.

Anti-money laundering (AML) provisions apply as soon as a company controls foreign assets or issues a currency. In the framework of an initial coin offering (ICO), therefore, a company launching an ICO and issuing currency tokens will have to comply with AML provisions. A company issuing pure utility tokens or security tokens may not have to comply with AML provisions, provided that the tokens are operative. Even if a company issuing tokens may not be under strict obligations to comply with AML provisions, it may find it difficult if not impossible to find a Swiss bank willing to provide a bank account unless it identifies its investors (in the case of the issuing of security tokens) according to AML standards compatible with the AML standards applied by Swiss banks.

Digital currency exchanges may be subject to AML requirements as exchanges from one cryptocurrency to the other are deemed to be monetary transactions.

Under the latest revisions of the AML Ordinance, service providers enabling the transfer of virtual currencies to a third party may be subject to AML obligations. This would expand the scope of application of AML duties considerably, as such duties would no longer apply only to persons having the possibility to move foreign assets.

Guidance

22 | Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no general regulatory or industry anti-financial crime guidance for fintech companies. However, the Swiss Bankers Association recently issued guidelines for banks on the application of AML rules to crypto-assets and to accounts of bank customers dealing in crypto-assets (such as in the case of an ICO). Furthermore, private associations such as the Capital Markets and Technology Association are currently working on guidelines on how AML rules should be applied to crypto-assets, in particular tokenised shares and non-voting shares. Finally, the Financial Market Supervisory Authority issued interpretative guidelines relating to cryptocurrency transfers.

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

23 | What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

A loan agreement may be executed without formal requirements (ie, an oral agreement is valid). Therefore, a loan agreement can also be entered into by, for example, email. Hence, a loan agreement entered into on a peer-to-peer or marketplace lending platform will be enforceable provided that the party wishing to enforce the agreement can provide sufficient evidence that the agreement was entered into by the counterparty.

Regarding security agreements, form requirements apply. A pledge under Swiss law is valid only if entered into in writing (ie, in the written form with an original (or valid electronic) signature of the pledgor).

A security assignment of rights will also only be valid if entered into in writing by the assignee. Mortgages can only be entered into in the form of a public deed. Under the new DLT Act, tokens may be transferred without assignment in writing.

Assignment of loans

24 | What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

An assignment of a claim can be done unilaterally without informing the debtor under the loan. However, such assignment of a claim must be done in writing. An assignment of a contract is possible without such formal requirements (unless the contract itself requires a certain form, which is not the case for loan agreements) but needs the consent of the counterparty (ie, of the debtor under the loan).

Securitisation risk retention requirements

25 | Are securitisation transactions subject to risk retention requirements?

The EU Securitisation Regulation does not apply in Switzerland and its rules are not part of the Swiss regulatory framework.

Securitisation confidentiality and data protection requirements

26 | Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Switzerland has strong confidentiality and data protection laws applicable to client relationships. However, the well-known banking secrecy and similar secrecy obligations of financial intermediaries apply to relationships with banks, securities traders and fund administrators only and not to each and every company. Therefore, the duty of confidentiality may depend on the origin of the loans: if such loans originate from a bank, the bank must ensure that the SPV complies with the relevant secrecy obligations (unless the bank customers consented and gave a waiver of their secrecy rights). However, a special purpose company domiciled in Switzerland will be subject to the Swiss Data Protection Act and will need to treat the data received in accordance with these provisions, which do not only protect natural persons but also legal entities. Furthermore, a transfer of data abroad may be subject to additional limitations.

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTO-ASSETS

Artificial intelligence

27 | Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

Switzerland currently does not have special rules regarding the application of artificial intelligence. Different institutions are conducting studies to answer questions regarding topics such as ethics or the risks and opportunities of AI innovation (State Secretariat for Economic Affairs press release 'The pros and cons of artificial intelligence'). In addition, the Swiss federal government funded research programmes on the effective and appropriate use of big data and has incorporated a new federal working group specialised in artificial intelligence (see the Swiss Confederation on 'The Swiss Digital Action Plan', 5 September 2018; also see the Swiss Confederation on 'Digital Switzerland Strategy', September 2018). On 13 December 2019, the report 'Challenges of Artificial Intelligence' was published, but without specific requests for changes to Swiss law.

A company providing robo-advice may qualify as an asset manager if the company automatically implements the advice on a client portfolio, may be subject to anti-money laundering (AML) rules and may have to become a member of a self-regulatory organisation.

Distributed ledger technology

28 | Are there rules or regulations governing the use of distributed ledger technology or blockchains?

There are no special rules or regulations governing the use of such technology and the general laws apply.

Crypto-assets

29 | Are there rules or regulations governing the use of crypto-assets, including digital currencies, digital wallets and e-money?

Switzerland has a technology-neutral approach to digital assets. Blockchain projects fall under the regulatory regimes of the industries they apply to, such as the finance industry. On 16 February 2018, the Financial Market Supervisory Authority (FINMA) published 'Guidelines for enquiries regarding the regulatory framework for initial coin offerings' wherein it describes in detail how it deals with the supervisory and regulatory framework for initial coin offerings (ICOs) under Swiss law. On 26 August 2019, further specifications were given relating to payments on the blockchain (Supervisory Notice 02/2019). FINMA will consider, among other things, the investor categories and ICO targets, compliance with AML regulations and the functionalities of the token generated but also the technologies used, the technical standards and wallets and technical standards to transfer tokens. In its guidelines, FINMA distinguishes three token categories, namely payment tokens, which are intended to be used as a means of payment and do not grant any claims against the issuer of the token, utility tokens, which grant access to an application or service, and 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.

The issuance of digital currencies will render the issuer subject to AML regulations. The offering of digital wallets, as a rule, will also subject the provider to AML regulations. The safekeeping of digital currencies in a wallet will, as a rule, not be considered as an activity requiring a banking licence by FINMA, provided that the private keys do not fall into the bankrupt estate of the custodian. However, if the custodian had control over the wallet (ie, is capable of disposing of the currencies therein without interference of the beneficiary), the holding of the wallet may render the custodian subject to banking licence requirements. In the recent proposals submitted by the Federal Council for discussion, further clarifications regarding the treatment of digital wallets in the bankruptcy of the custodian are proposed and certain service providers for crypto-asset transfers may also be subjected to AML obligations.

Digital currency exchanges

30 | Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

A broker providing services for the conversion of fiat currencies into cryptocurrencies, cryptocurrencies into cryptocurrencies or cryptocurrencies into fiat currencies will need to become a member of a self-regulatory organisation and be subject to AML rules. If it wishes to operate a digital currency exchange, this can usually be done without the prudential licence requirement. However, if not only digital currencies but also security tokens will be traded on the exchange, the exchange may qualify as an organised or a multilateral trading facility under the Financial Market Infrastructure Act or as a DLT trading facility and must comply with the rules applicable to these institutions.

Initial coin offerings

31 | Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

Switzerland has a technology-neutral approach to digital assets. Blockchain projects fall under the regulatory regimes of the industries they apply to, such as the finance industry. On 16 February 2018, FINMA published 'Guidelines for enquiries regarding the regulatory framework for initial coin offerings' wherein it describes in detail how it deals with the supervisory and regulatory framework for ICOs under Swiss law. On 26 August 2019, further specifications were given relating to payments on the blockchain (Supervisory Notice 02/2019). FINMA will consider, among other things, the investor categories and ICO targets, compliance with AML regulations and the functionalities of the token generated but also the technologies used, the technical standards and wallets and technical standards to transfer tokens. In its guidelines, FINMA distinguishes three token categories, namely payment tokens, which are intended to be used as a means of payment and do not grant any claims against the issuer of the token, utility tokens, which grant access to an application or service, and 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.

DATA PROTECTION AND CYBERSECURITY

Data protection

32 | What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

There are no specific rules and regulations that would apply to fintech products and services. Hence, the existing data protection law and the guidelines from the Swiss Federal Data Protection and Information Commissioner (FDPIC) apply. The Swiss Federal Data Protection Act is currently being revised.

Cybersecurity

33 | What cybersecurity regulations or standards apply to fintech businesses?

There are no specific cybersecurity regulations or standards that apply to fintech businesses. Hence, the existing data protection law and the guidelines from the FDPIC apply. In particular the 'Guide on Technical and Organisational Measures' (see file://srvzhfile02/users$/cgo/VDI/Downloads/guideTOM_en_2015%20(1).pdf).

OUTSOURCING AND CLOUD COMPUTING

Outsourcing

34 | Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

Any company outsourcing part of its business must comply with the Swiss Data Protection Act.

Furthermore, if a financial services company subject to prudential supervision outsources part of its business, it will need to comply with the guidelines provided by the Financial Market Supervisory Authority (FINMA) in its outsourcing circular (2018/3 FINMA 'Guideline on Outsourcing – banks and insurers') and in Annex 3 of the Operational Risk Circular (dealing with customer identification data). Under these rules, outsourcing of material aspects of a business is generally permitted, provided that the financial service provider is capable of supervising the outsourcing provider, is safeguarding security rights of its clients, is securing in its contracts with the outsourcing provider that itself, its auditing company and FINMA will at all time be capable of inspecting compliance by the outsourcing provider with the Swiss financial market rules and that it properly selects, instructs and supervises the outsourcing provider. Furthermore, the cybersecurity measures of the outsourcing provider need to be adequate and in line with the relevant measures of the financial intermediary.

Cloud computing

35 | Are there legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific rules on cloud computing, but financial services companies need to secure confidentiality of their client data and, as a rule, comply with the outsourcing circulars. In addition, the Swiss Federal Data Protection and Information Commissioner's 'Guideline on Cloud Computing' applies.

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

36 | Which intellectual property rights are available to protect software, and how do you obtain those rights?

Under Swiss copyright law, only works that are considered an intellectual creation with an individual character are protected by copyright (article 2, paragraph 1 of the Swiss Copyright Act). AI as software generally meets these requirements. However, works created by AI cannot be considered intellectual creations as they are not made by humans. These works currently cannot be copyrighted and the author cannot acquire copyright derivatively. Copyrighted works are protected for 70 years after the death of the author (50 years with regard to computer programs). As a rule, computer programs cannot be patented under Swiss law.

IP developed by employees and contractors

37 | Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

As long as the intellectual property is developed by an employee during the course of employment and in fulfilment of his or her working tasks, then the intellectual property belongs by virtue of law to the employer. With regard to contractors or consultants, these rules do not apply. Here it is decisive that the respective rights are transferred and assigned to the principal.

Joint ownership

38 | Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

No, there are no restrictions in this respect. In Switzerland, one is very flexible and free to agree on rules. However, if nothing is agreed on, then the general provisions of the applicable laws (eg, the Swiss Code of Obligations and the Copyright Act) apply. In particular, with regard to joint ownership, it is advisable to set out the applicable rules in writing in a contract, because the rules set out in the applicable laws usually are not specific enough for each individual case.Furthermore, competition law may apply to agreements.

Trade secrets

39 | How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

In Switzerland, trade secrets are mainly protected by non-disclosure agreements or confidentiality clauses in contracts. There is, unlike in the EU, no specific law in Switzerland dealing with the protection of trade secrets. There are provisions in individual laws dealing with trade secret protection (eg, in the Criminal Code or in the Unfair Competition Act). In court proceedings, a party can request the court keep trade secrets confidential and not disclose them to the counterparty.

Branding

40 | What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

In Switzerland trademarks can be applied for fintech services and products. An application for a trademark must be filed with the Swiss Federal Institute of Intellectual Property. By first conducting a trademark research in online databases or with special trademark agents, fintech businesses can check whether prior identical or similar trademarks exist.

Remedies for infringement of IP

41 | What remedies are available to individuals or companies whose intellectual property rights have been infringed?

There are civil and criminal law remedies. Under the applicable laws (eg, the Swiss Code of Conduct, Copyright Act, Patents Act, Trademark Act and Unfair Competition Act), a party whose intellectual property rights are infringed can file for injunctive relief, a claim for damages, etc. Under the Criminal Code the party can file a criminal complaint for an offence relating to intellectual property infringements.

COMPETITION

Sector-specific issues

42 | Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

No specific rules have been issued under competition law applicable to fintech companies, so that the general rules of Swiss competition law apply. Swiss competition law is to a large extent aligned with EU competition law and the discussion in the EU relating to completion law in the digital economy is closely followed in Switzerland. Therefore, it can be expected that once the EU applies additional rules to the digital economy, Switzerland will follow and apply similar rules. With respect to certain business set-ups involving the exchange of data between various parties, Switzerland follows the approach of the EU on the applicability of competition law rules to the exchange of data between competitors or potential competitors, and a company intentionally facilitating this exchange of market relevant data may be held to be in breach of competition law as well, even if it is not active on the same market.

TAX

Incentives

43 | Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no tax incentives specifically designed for fintech companies and investors. However, both companies and investors benefit from the generally favourable Swiss tax environment. The corporate tax rate depends on the exact location of the company but may be as low as 12 per cent, the VAT rate is significantly lower than in most EU member states and individual investors resident in Switzerland do not pay taxes on gains realised on the sale of equity investments. Very low taxes apply to capital gains from the sale of equity investments by corporate shareholders if the participation was held for at least one year and was 10 per cent or more of the equity of the company.

Increased tax burden

44 | Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

There are no new or proposed tax laws that will significantly increase tax. On the contrary, it is envisaged that corporate taxes will be lowered significantly in connection with the abolition of certain privileges currently granted to holding companies. Administrative costs for fintech companies increased for fintech companies qualifying as an asset manager as asset managers became prudentially supervised under the new Financial Institutions Act, effective by 1 January 2020; however, existing asset managers still profit from tranitory provisions.

IMMIGRATION

Sector-specific schemes

45 | What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

There are no special immigration schemes available for fintech businesses or regimes specific to the technology or financial sector. However, citizens of EU member states are entitled to receive a work permit

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in Switzerland under the bilateral agreements between Switzerland and the EU. Furthermore, Switzerland and the United Kingdom are discussing a treaty to ensure that UK and Swiss nationals will continue to benefit from the privileges granted to EU member state citizens after Brexit. Nationals of a country outside the European Economic Area will require a work permit, which may be subject to quotas. As a rule, work permits for highly qualified persons, such as senior managers or technical experts, will always be available.

UPDATE AND TRENDS

Current developments

46 | Are there any other current developments or emerging trends to note?

There are various developments in Switzerland regarding fintech.

On the regulatory site, an act on establishing a legal and a distribution framework for a generally accepted digital identity was proposed and subjected to a public vote in 2021; it was rejected by the public vote and a new act will have to be prepared. Furthermore, the new Data Protection Act was dicussed and finalised in parliament. But, first and foremost, the first part of the federal act on adapting the federal law to developments of the distributed ledger technology (the DLT Act) became effective in February 2021. The second part will enter into force in summer 2021. In this act, various changes to existing Swiss laws are made, in particular regarding new (integrated) financial infrastructures enabling integrated token trading platforms, clarifications regarding the law applicable to the transfer of tokens, clarifications and provisions of the anti-money laundering rules and various provisions on the treatment of digital assets in a bankruptcy.

On the commercial side, there are various initiatives that focus on establishing wallet providers, trading platforms and other projects in Switzerland. Two banks obtained a banking licence focused on digital assets in 2019; a third application was withdrawn in 2021. A forth is still pending. A number of other banks publicly announced that they will target crypto-markets. Therefore, 2021 will again see massive developments in connection with the setting-up of infrastructures for the crypto and fintech industry in Switzerland.

There are now also various projects to enable the issuance of security tokens and to set up companies with tokenised shares; the first few tokenisations of shares have already taken place.

Various Swiss universities (EPFL, ETH, Basle University and Zurich University), as well as universities of applied science, have initiatives regarding further development of research on fintech. Among others, the Swiss Fintech Innovation Lab at Zurich University brings together researchers from banking and finance, business informatics, management, social sciences, etc, and universities of applied sciences offer a variety of CAS programmes on fintech

While the crypto boom of 2017 may be history, the future has only started for the Swiss financial industry and it can be expected that the Swiss ecosystem will remain highly dynamic.

Coronavirus

47 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic has brought about some emergency legislation, in particular government guarantees for bank loans to enterprises. As the amount of the loan available was linked to turnover, for many startups the loans were not available. However, several cantons have special initiatives to secure access to capital, in particular for start-ups in the tech sector. It is advisable for any start-up to enquire with the local authorities about what support is available.

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