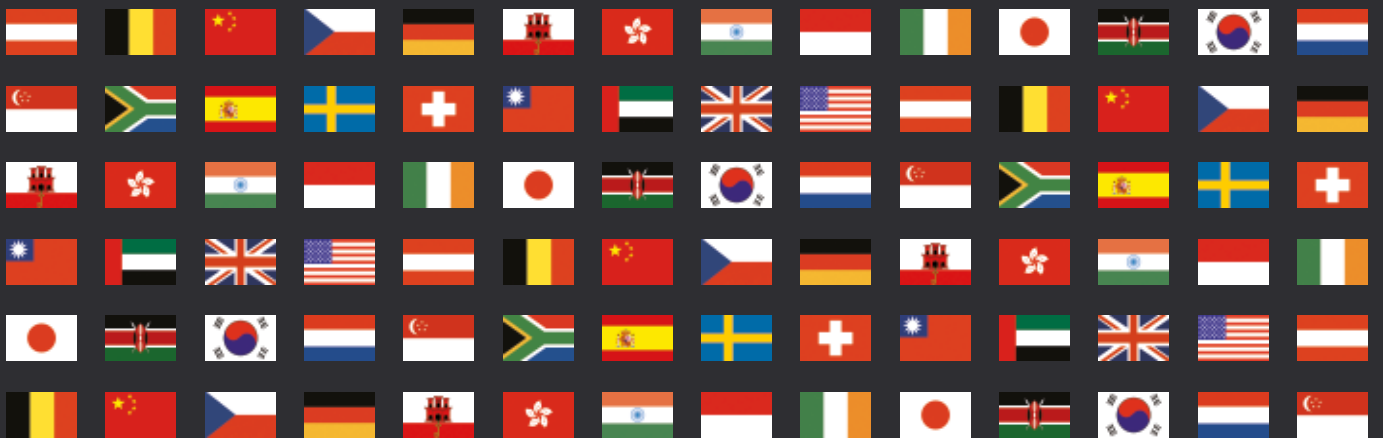


# Fintech 2020

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# Fintech

# 2020

**Contributing editors****Angus McLean and Penny Miller****Simmons & Simmons**

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Fintech*, which is available in print and online at [www.lexology.com/gtdt](http://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 Austria, Gibraltar, Ireland, Kenya and South Africa.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

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, for their continued assistance with this volume.



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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 at the 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 all established research laboratories in and around Zurich, adding to the technical innovation network. Zurich University recently announced that it will create 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. Also, the major Swiss banks such as UBS and Credit Suisse both have fintech innovation laboratories. Several projects are currently aiming at setting up crypto and fintech-focused banks and applying for a banking licence with the Financial Market Supervisory Authority (FINMA).

Furthermore, there are numerous projects to set up crypto brokers and crypto exchanges in order to increase liquidity for tokens, including tokenised shares.

### 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 such initiatives. FINMA set up a special fintech desk as a competence centre for fintech applications and fintech 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 such 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 the 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.

## 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 is in general supervised by FINMA. FINMA regulates the provision of such products and services in more detail by issuing circulars and guidelines such as the guideline for ICOs. FINMA is the competent supervisory authority for banks, insurance companies and asset managers managing assets of collective investment schemes.

Financial intermediaries not subject to prudential supervision (for the time being, in particular asset managers, although such asset managers may become subject to prudential supervision by 1 January 2020) are not subject to direct FINMA supervision but have to join a self-regulatory organisation (SRO) for the purpose of anti-money laundering (AML) compliance. The SROs in their turn are supervised by FINMA but are privately run organisations.

Finally, certain ICOs were made by foundations domiciled in Switzerland and such foundations are supervised by separate supervisory authorities on 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?

FINMA provides on its website ([www.finma.ch](http://www.finma.ch)) 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 Stock Exchange Act (to be abolished by the Financial Institutions Act by 1 January 2020), 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 such 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

re-invested 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 depositors 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 such undertakings to rules less stringent than the rules applicable to banks, providing no interest is paid on such deposits and the funds are not re-invested.

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 traders 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 will subject the asset manager to the obligation to join a SRO and to comply with the relevant rules of the Swiss AMLA; as from 1 January 2020, such asset managers may require a licence. This includes persons who carry out credit transaction 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?

As outlined, 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 has to obtain a licence (from a cantonal authority, unless it holds a banking licence), has to 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, such companies have to obtain a securities traders 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, market place 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.

### 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 and 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 such fund to another party of the marketplace, it will be subject to AML regulations and will need to join an SRO in order to comply with such 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 factsheet 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 such funds to the recipient within a time period of up to 60 days maximum without paying interest on the funds, the crowdfunding platform will be subject to AML regulations and will need to become a member of a 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 such amount or if interest is paid on the amounts 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 a 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 in 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.

### 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.

### Insurance products

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

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

### Credit references

#### 15 | 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 such information needs to 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

#### 16 | Can regulated activities be passported into your jurisdiction?

No passporting of regulated activities into Switzerland is possible.

### Requirement for a local presence

#### 17 | 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; under the revised rules, a registration requirement will be introduced, probably by 1 January 2020.

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

## SALES AND MARKETING

### Restrictions

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

See question 17.

## CHANGE OF CONTROL

### Notification and consent

#### 19 | 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 have to obtain an additional licence from FINMA. 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 has to be provided on the new shareholder and on the persons controlling such new shareholder up to the ultimate beneficial owner.

## FINANCIAL CRIME

### Anti-bribery and anti-money laundering procedures

#### 20 | 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 such provisions. For prudentially supervised companies, compliance with such anti-bribery rules is part of the supervisory concept and any breaching of such rules may endanger the licence.

AML provisions apply as soon as a company controls foreign assets or issues a currency. In the framework of an 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 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.

In a recent major legislative project, new rules on the application of Swiss AML law to cryptoassets are proposed. However, the new proposals are subject to discussion and a formal proposal to parliament may not be presented prior to the end of 2019.

## Guidance

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

There are no general regulatory or industry anti-financial crime guidance for fintech companies. However, the Swiss Bankers Association ([www.swissbanking.org](http://www.swissbanking.org)) recently issued guidelines for banks on the application of AML rules to cryptoassets and to accounts of bank customers dealing in cryptoassets (such as in 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 cryptoassets, in particular tokenised shares and non-voting shares.

## PEER-TO-PEER AND MARKETPLACE LENDING

### Execution and enforceability of loan agreements

#### 22 | 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.

### Assignment of loans

#### 23 | 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 has to be done in writing (see question 22). 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

### 24 | 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

### 25 | 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 relationship with banks, securities traders and fund administrators only and not to each and every company. Therefore, the duty of confidentiality may depend on the origination of the loans: if such loans originate from a bank, the bank has to 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 CRYPTOASSETS

### Artificial intelligence

#### 26 | 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', [www.seco.admin.ch/seco/en/home/seco/nsb-news.msg-id-71639.html](http://www.seco.admin.ch/seco/en/home/seco/nsb-news.msg-id-71639.html)). 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).

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

### Distributed ledger technology

#### 27 | 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. However, see question 28.



## Cryptoassets

- 28 | Are there rules or regulations governing the use of cryptoassets, 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, 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. 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.

As outlined above, the issuing 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.

## Digital currency exchanges

- 29 | 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 crypto currencies, crypto currencies into crypto currencies or crypto currencies 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 as a multilateral trading facility under the FMIA and has to comply with the rules applicable to such institutions.

## Initial coin offerings

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

See question 28.

## DATA PROTECTION AND CYBERSECURITY

### Data protection

- 31 | 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.

### Cybersecurity

- 32 | 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://srvzfile02/users\$/cgo/VDI/Downloads/guideTOM\_en\_2015%20(1).pdf).

## OUTSOURCING AND CLOUD COMPUTING

### Outsourcing

- 33 | 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 has to 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 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 such rules, outsourcing of material aspects of a business is in general 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

- 34 | 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 outlined above. In addition, the FDPIC's 'Guideline on Cloud Computing' applies (see [www.edoeb.admin.ch/edoeb/en/home/data-protection/Internet\\_und\\_Computer/cloud-computing/guide-to-cloud-computing.html](http://www.edoeb.admin.ch/edoeb/en/home/data-protection/Internet_und_Computer/cloud-computing/guide-to-cloud-computing.html)).

## INTELLECTUAL PROPERTY RIGHTS

### IP protection for software

- 35 | 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

- 36 | 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

- 37 | 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, Copyright Act, etc) 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.

### Trade secrets

- 38 | 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 provision 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 to keep trade secrets confidential and not to disclose to the counterparty.

### Branding

- 39 | 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

- 40 | 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, Swiss Code of Conduct, Copyright Act, Patents Act, Trademark Act, Unfair Competition Act, etc) 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

- 41 | 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 such 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

- 42 | 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. 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

- 43 | 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 a 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 may increase to a certain extent for fintech companies qualifying as an asset manager as asset managers will become prudentially supervised under the new Financial Institutions Act, which is expected to become effective by 1 January 2020.

## IMMIGRATION

### Sector-specific schemes

44 | 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 in Switzerland under the bilateral agreements between Switzerland and the EU. Furthermore, Switzerland and the United Kingdom prepared 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

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

There are various developments in Switzerland regarding fintech.

On the regulatory side, an act on establishing a legal and a distribution framework for a generally accepted digital identity was proposed and may be in a final form by the end of 2019. Furthermore, a draft of a new Data Protection Act, which is currently on hold, may be discussed in parliament by 2020. But, first and foremost, the proposal for a federal act on adapting the federal law to developments of the distributed ledger technology was submitted for discussion in spring 2019 and it is expected that a final proposal of the government to parliament will be submitted by the end of 2019. In this draft act, various proposals for 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 AML 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. Three entities aim at obtaining a banking licence focused on digital assets in 2019. Therefore, 2019 will 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 issuing of security tokens and to set up companies with tokenised shares. It is generally expected that 2019 will be the year of the asset token.

Various Swiss universities (EPFL, ETH, Basle University and Zurich University) 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.

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.

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