FinTech: Switzerland is gearing up

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First cryptocurrency fund seeks licensing in Switzerland

Building on lessons learned from its United States competitors to register a cryptocurrency fund with the Securities and Exchange Commission (SEC) in the US earlier this year, Crypto Fund Ltd, a corporation under Swiss law, is seeking to launch a cryptocurrency fund in Switzerland for qualified investors only.[1] To do this, the fund needs a licence from the Swiss regulator, the Swiss Financial Market Supervisory Authority (FINMA). While one of the shortcomings of the attempt in the US seems to have been the insufficient diversification of the fund, the Swiss project is designed to invest in a basket of cryptocurrencies not limited to Bitcoin. However, certain liquidity requirements need to be met to add a cryptocurrency to the basket. The cryptocurrencies currently meeting these liquidity requirements are Bitcoin and Ether, which each account for about 35 per cent of the basket, while the rest is distributed between Ripple and Litecoin. Crypto Fund aims to launch the fund later this year as a passive, index-based fund. It collaborates with (among others) the renowned Humboldt University in Berlin to devise its own cryptocurrency index comprising ten major cryptocurrencies. Crypto Fund's representatives also point out that they engage or collaborate with well-known professionals from the funds industry and do not rely only on technical experts, such as engineers and information technology-specialists ('techies'), allegedly a difference compared to failed attempts to establish cryptocurrency funds in the past.

New attempts to establish a recognised digital identity

It has become clear in recent years that the digital economy can thrive only if a widely recognised 'digital identity' (ie, the means to identify a natural person or corporation digitally) can be put in place. Attempts thus far have been overly complex and/or with redundant applicability, still frequently requiring that a person provides a scan of his or her physical identification document (eg, a passport or driver's licence) that must be verified manually by the respective recipient. Initiatives on the Swiss federal law level to overcome these difficulties started years ago ('SuisseID'), but have not had satisfactory results. It is therefore unsurprising that some of the leading exponents in the Swiss private sector began to collaborate on establishing digital identity systems. Two of the most promising systems to be launched this year or next year include one devised by UBS and Credit Suisse (the two largest banks in Switzerland, both ranking among the globally systemically important banks) in collaboration with Swisscom (Switzerland's leading telecoms company) and Notakey (a Latvian startup company);[2] and the other devised by the Swiss Postal Service and Swiss Federal Railways, both held by the Swiss Confederation.[3] Notwithstanding the innovations proposed to Swiss federal law recently (eg, the 'e-ID'), it may be hypothesised that private sector solutions will lead the way for digital identity systems in the future.

Entry into force of the first part of Switzerland's FinTech regulation

Until recently FinTech solutions were confronted with a Swiss financial market regulation not taking into account their special characteristics compared to traditional financial services. In particular, banking licence requirements were easily triggered, for example, 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 500m Swiss francs (approximately $500m) while refinancing itself with more than five banks not associated with the FinTech company. Fulfilling all prerequisites of a regular banking licence, however, was (and arguably still is) unreasonably burdensome for the average FinTech company: not only would it have to meet capital requirements of more than 20m Swiss francs (approximately $20m), but it

would also have to comply with high corporate governance and regulatory standards.

To strengthen the competitiveness of Switzerland as an international financial hub, as well as to kick-start innovation in the financial services industry, the Swiss government (the Swiss Federal Council) has recently amended essential parts of Swiss banking regulation, resulting in exemptions from banking licensing requirements, of which FinTech companies (and others) may benefit in certain cases.[4] These exemptions, which entered into force on 1 August 2017, are twofold:

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 day-period, no banking licence needs to be obtained. Crowdfunding platforms may capitalise on this exemption in particular, since it allows to route the funds through the platform. Similar advantages result for payment service providers. However, securities dealers are expressly excluded from invoking the aforementioned exemption.

Second, the rule whereby a banking licence is required whenever: (1) either funds of more than 20 investors are actually held; or (2) the enterprise publicly announces that it is willing to accept such funds (regardless of the actual number of investors) is 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: (1) the funds do not exceed one million Swiss francs (approx. $1 million); (2) the funds are neither invested nor interest bearing (except in the cases outlined below); and (3) 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 (ie, 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 licence within 30 days. FINMA may prohibit the institution from accepting additional funds from the public until a banking licence is granted, should FINMA consider this necessary taking into account market and customer protection.

In particular FinTech startup companies as well as other companies within the banking sector are equally eligible to capitalise on the aforementioned exemptions in principle. Such exemptions from obtaining a banking licence do not exempt FinTech firms from complying with anti-money laundering provisions, to which FinTech firms may be subject whenever they act as financial intermediaries.

First steps by the Swiss parliament upper chamber to embrace 'banking licence light'

Even prior to the entry into force of the aforementioned exemptions, the upper chamber of the Swiss Parliament (the Swiss Council of States) had already endorsed some principles of 'banking licence light' (which is considered the second part of Switzerland's FinTech regulation), as it had agreed on an amendment to the Swiss Federal Act on Banks and Savings Banks of 1934 ('BankA') when debating two proposed financial market laws: the prospective Swiss Financial Services Act and the Swiss Financial Institutions Act.[5] The amendment to BankA was headed 'promoting innovation' and set forth, inter alia, 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 100m Swiss francs (approximately $100m) and the assets are neither invested nor interest bearing. Instead, BankA shall only apply *mutatis mutandis* to such entities, potentially going along with lower requirement as regards accounting standards, auditing and depositor protection. Hence, the Swiss Council of States has already taken the first steps to establish 'banking licence light'. Yet, against the background that the amendment to BankA – along with all other amendments to Swiss federal law – will

also have to be enacted by the lower chamber of the Swiss Parliament (the Swiss National Council) to come into effect, it remains to be seen whether a 'banking licence light' will undergo further changes.

Notes

1 Werner Grundlehner, 'Im Rennen um den ersten Krypto-Fonds' *Nene Zürcher Zeitung* (Zürich, 14 June 2017) www.nzz.ch/finanzen/fonds/ein-fonds-fuer-bitcoin-co-im-rennen-um-den-ersten-krypto-fonds-ld.1300587 accessed 7 July 2017.

2 Editorial, 'Notakey, Swisscom, UBS and Credit Suisse kickstarting in Zurich' (*Swiss Finance Startups*, 15 December 2016) http://swissfinancestartups.com/2016/12/notakey-swisscom-ubs-cs/ accessed 7 July 2017.

3 Editorial, ' Post und SBB schaffen digitale Identitäten' (*SRF*, 24 March 2017) www.srf.ch/news/panorama/post-und-sbb-schaffen-digitale-identitaeten accessed 7 July 2017.

4 www.admin.ch/gov/en/start/documentation/media-releases.msg-id-67436.html

5 See www.parlament.ch/centers/eparl/curia/2015/20150073/S11%20D.pdf accessed 7 July 2017.