Fintech

Contributing editors
Angus McLean and Penny Miller

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GETTING THE DEAL THROUGH

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Switzerland

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In general terms, Swiss law and regulation distinguishes between the following regulated financial institutions that require a licence from the Swiss Financial Market Supervisory Authority (FINMA):

- banks;
- domestic and foreign securities dealers;
- insurance companies;
- fund management companies and asset managers of Swiss or foreign investment funds; and
- independent asset managers, acting exclusively in their clients' names based on powers of attorney.

Banks are defined as entities that are active mainly in the area of finance and in particular, but in a non-exclusive understanding, those who accept deposits from the public on a professional basis or solicit these publicly to finance in any way, for their own account, an undefined number of unrelated persons or enterprises (ie, more than 20 clients), with which they form no economic unit, or who refinance themselves to a substantial degree from third parties to provide any form of financing for their own account to an undefined number of unrelated persons and institutions. Substantial financing by third parties is given if more than five banks provide loans or other ways of financing to the company in the amount of at least 500 million Swiss francs (as average over the last year). Many fintech companies or platforms had limited the number of clients providing financing to 20 in order not to qualify as a bank. As of 1 August 2017, these rules have been amended. The revised Swiss Banking Ordinance no longer looks at the number of clients but the value of client assets held by a company. In the event deposits of not more than 1 million Swiss francs are held by a company, no banking licence will be needed. This amendment, often referred to as regulatory sandbox, shall allow fintech companies to access the market without bearing the regulatory burden on day one.

Securities dealers are natural persons, entities or partnerships who buy and sell securities in a professional capacity on the secondary market, either for their own account with the intent of reselling them within a short time period or for the account of third parties; make public offers of securities on the primary market; or offer derivatives to the public.

Independent asset managers may not: act in their own names; hold omnibus accounts; or manage the assets of their clients by accepting them in their books and opening mirror accounts (in which case they will be viewed as securities dealers).

As a rule, the first four categories need to obtain an authorisation licence from FINMA before starting business activities in or from Switzerland. The fifth category of independent asset managers is, in principle, not required to obtain an authorisation from FINMA for such limited activities, but is subject to anti-money laundering regulations.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is a regulated activity in Switzerland. The respective Swiss law aims to protect consumers with rules about the form and content of consumer lending contracts; norms providing transparency in this field; and by providing for a statutory right to withdraw from the contract by the consumer. The lender is obliged to verify the creditworthiness of interested contracting parties following a specific procedure and a central database shall prevent over-indebtedness or at least its aggravation. A consumer lending company has to obtain a licence from the cantonal authorities and has to hold own assets in the amount of 8 per cent of the issued consumer loans.

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

Trading loans in the secondary market is not a regulated activity. In the event the investment company is buying and selling securities in a professional capacity, in the secondary market, either for their own account with the intent of reselling them within a short time period or for the account of third parties, such company is required to obtain a securities dealer licence from FINMA.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Along with banks and securities dealers, FINMA supervises collective investment schemes. The Authority is responsible for the authorisation and supervision of all collective investment schemes set up in Switzerland and the distribution of shares or units in collective investment schemes in and from Switzerland to retail investors. Domestic collective investment schemes and any party responsible for managing such a scheme (ie, fund management companies, asset managers and distributors) or for safekeeping the assets of a collective investment scheme (ie, custodian banks) require a licence and are supervised by FINMA. The investment products distributed by each collective investment scheme, including its related documents, require prior approval from FINMA. The different types of collective investment schemes provided by law are subject to investment and borrowing restrictions. The same rules apply for fintech companies that manage an investment fund. There are no specific regulations applicable for fintech companies in this respect.

5 Are managers of alternative investment funds regulated?

Switzerland is not a member state of the European Union. The Alternative Investment Fund Managers Directive (AIFMD) does not apply in Switzerland. In general, asset managers of Swiss or foreign collective investment schemes will have to obtain a licence from FINMA. To obtain the licence, the asset manager must, inter alia, demonstrate equity capital of at least 500,000 Swiss francs. Some exceptions regarding the duty to obtain a licence apply. For instance, asset managers of funds limited to qualified investors are excluded from the licensing requirement under one of three conditions: first, the assets under management (including assets acquired through the use of leverage) may not exceed 100 million Swiss francs; second, the assets are less than 500 million Swiss francs (provided that the managed portfolio is not leveraged and that investors do not have redemption rights exercisable for a period of five years following the date of the initial investment); or third, all investors belong to the same financial group as the asset managers. These provisions are in line with the de minimis rule introduced by the AIFMD, under which voluntary licensing by the asset manager remains possible. In addition, in certain justified cases FINMA may,

on request, partially or completely exempt asset managers of foreign funds from the provisions of the applicable Swiss law and regulation.

6 May regulated activities be passported into your jurisdiction?

No. Given that Switzerland is not part of the European Union, regulated activities may not be passported into Switzerland.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Providers of financial services can place their transborder products in Switzerland without establishing a local presence. In fact, Switzerland acts with the physical presence test and the principle of home country supervision. According to these aspects, financial services providers without local presence undergo financial supervision in their home country and, therefore, essentially do not need a Swiss licence to provide financial services. An exception is the licensing requirement for public offering and managing of collective investment schemes. Switzerland is applying a liberal regime in admitting foreign financial services without establishing a local presence in comparison to international regulation.

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

Peer-to-peer and marketplace lending is subject to anti-money laundering regulation in Switzerland, provided that the respective fintech company is acting as lending company (and not as mere marketplace without accepting and forwarding any money). A company subject to anti-money laundering regulations has to submit itself to the supervision of FINMA or affiliate with a self-regulatory organisation for anti-money laundering purposes.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Owing to a lack of specific norms in the field of fintech and crowdfunding, the general rules of Swiss law are applicable to the concept of crowdfunding; in particular, private law (especially contract law and company law), as well as financial market relevant supervision law.

Concerning the private law aspect, there is no general solution to the legal qualification of a crowdfunding system available under Swiss law. Depending on the specific arrangement of the regime, the crowdfunding system could contain a brokerage contract or a commercial agency contract (a simple agency contract) in terms of the relationship between the crowdfunding platform and the other parties. Regarding the relationship between provider and seeker of financial remedies, a classification as fixed-term loan, gifts or innominate contract might be adequate. For major crowdfunding programmes, it may even be reasonable to qualify the system as a simple partnership.

With regard to the aspect of financial market relevant supervision law, there are, again, no specific rules for crowdfunding available. As long as funds directly move from project financers to project developers (the time frame for such transfer has recently been extended from seven to 60 days), crowdfunding platforms would not be subject to licensing requirements under financial market legislation (even if the funds are channelled through a third party independent of the project developers, platform operator or project financers); but as soon as the financial remedies are channelled through the account of platform operators, they might need a banking licence (which is rather unlikely) and at the same time, they would be subject to anti-money laundering regulation.

In conclusion, as major insecurities exist in the field of crowdfunding and as the system is gaining in importance, adaptations of Swiss law may be expected in future. In particular, it is expected that the legislator will focus on working on coordination and harmonisation with foreign regulation, because the Swiss market on its own is too small to be attractive for crowdfunding.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation applicable on invoice trading in Switzerland. A fintech company trading in invoices is, generally speaking, subject to anti-money laundering regulation.

11 Are payment services a regulated activity in your jurisdiction?

Switzerland does not have a regulatory framework similar to the European Payment Services Directive (PSD2). The PSD2 is applicable in the European Economic Area (EEA) but does not apply to cross-border payments from the EEA to Switzerland and vice versa. Needless to say, Swiss payment transaction providers will be exposed to PSD2 should they do business relating to EEA countries. Switzerland is part of the Single European Payments Area (SEPA). The rulebook of the SEPA does not require the implementation of the PSD2. In Switzerland, payment services are subject to anti-money laundering regulation.

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

Yes. Given that there are no specific rules for fintech companies selling or marketing insurance products. All insurance companies operating in Switzerland are obliged to obtain a licence for their business activities from FINMA. With some exceptions Swiss law treats reinsurers in the same way as primary insurers.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

FINMA has no supervisory authority over the rating agencies but it recognises certain rating agencies. Regulated financial institutions may of course use ratings to meet a number of regulatory requirements. Fintech companies often issue credit references, especially for borrowers, or offer credit information services and may do so without the need to obtain a licence.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

No.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The Swiss Federal Council decided to ease the regulatory framework for providers of innovative financial technologies in November 2016. As a result, the Federal Department of Finance (FDF) presented the 'FinTech Strategy Switzerland' as a form of deregulation with three supplementary elements:

- First, the deadline for holding (fiat) money in settlement accounts has been prolonged from seven to 60 days.
- Second, a company may now accept deposits in a total value of 1 million Swiss francs without the need to obtain a banking licence from FINMA (regulatory sandbox). These two fintech-related elements have been introduced as of 1 August 2017.
- Third, a banking licence 'light' should be introduced that allows a company to accept deposits of up to 100 million Swiss francs provided that the funds will not be invested nor subject to interest payments to the clients. This new licence should be paired with a loosening of the licensing process and account, auditing and regulatory capital requirements. Unfortunately, the implementation of this new licence category has been shelved. It is now only expected to be implemented with the Financial Services Act and the Financial Institution Act scheduled for 2019 (the Financial Services Act aims to introduce equivalent rules to the European Markets in Financial Instruments Directive).

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The Swiss regulator FINMA has entered into memoranda of understanding with various foreign regulators and cooperates with foreign regulators on a regular basis. In respect of fintech, FINMA entered into a cooperation agreement with the Monetary Authority of Singapore in September 2016. As per the agreement, the two authorities intend to cooperate with the aim of encouraging and enabling innovation in their respective financial services industries and of supporting financial innovators in meeting the regulations in each others' jurisdictions as may be required to offer innovative financial services in the respective

financial markets. Both authorities aim to establish a specific fintech-friendly environment.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

The distribution of financial products (ie, investment funds and structured products) is regulated in Switzerland. At present, Switzerland has not implemented a financial services act similar to the Markets in Financial Instruments Directive (MiFID) I or MiFID II, but a draft Financial Services Act has been proposed, and is being discussed in the Swiss parliament, which is unlikely to be implemented before 2019. When it comes to the marketing of financial products, the draft law follows the principles of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC and the regulation on key information documents for packaged retail and insurance-based investment products but does not provide specific rules on the marketing material for financial services.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No. Unrestricted amounts of liquid funds (ie, cash, foreign currency and securities (shares, bonds and cheques)) can be imported into Switzerland, brought through Switzerland in transit or exported from Switzerland. Further, the funds do not need to be declared.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

No. The distribution of financial products based on reverse solicitation is not regulated in Switzerland. The provider must, despite any reverse solicitation, comply with anti-money laundering regulation.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

Providers of financial services having a physical presence in Switzerland require a licence in Switzerland even if they serve investors of clients outside of Switzerland or in the event the activities take place outside of Switzerland. The licensing requirements are triggered by the physical presence in Switzerland.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific continuing obligations applicable on cross-border activities of a Swiss fintech company or a foreign fintech company doing business in Switzerland on a mere cross-border basis. Where a Swiss fintech company is subject to Swiss anti-money laundering regulation, it has to provide an anti-money laundering file for each client. The fintech company has to notify the Money Laundering Reporting Office Switzerland (MROS) if it has reason to suspect money laundering is taking place.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Providers of financial services having a physical presence in Switzerland require a licence in Switzerland even if they serve investors of clients outside of Switzerland or in the event the activities take place outside of Switzerland. The licensing requirements are triggered by the physical presence in Switzerland.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

The use of distributed ledger technology is not specifically regulated in Switzerland. Essentially the existing regulatory framework applies, which is largely technology agnostic. Depending on the scope and purpose of the business model, authorisation requirements for central custodians of securities, securities settlement systems and payment systems under the regime of the Swiss Financial Market Infrastructure Act might be envisioned. Also, distributed ledgers operated in Switzerland or out of Switzerland generally qualify as a 'financial intermediaries' if they professionally accept or keep as a custodian foreign assets or help to invest or transfer them (article 2, paragraph 3 AMLA). Such blockchain operations are thus bound to heed Swiss anti-money laundering obligations.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

There is no bespoke regulation as to the use of e-money or virtual currencies in Switzerland. The Swiss Federal Council published a report on virtual currencies such as bitcoin in 2014, but it refrained from proposing specific regulation because of the marginal economic importance of bitcoin. FINMA, in its official statements, also focuses mainly on bitcoin and has issued a corresponding factsheet that provides some regulatory guidance, but tries hard to create a palatable environment for innovative business models. For instance, in contrast to a view adopted in the factsheet, FINMA would not consider the safekeeping of virtual currencies in account deposits or a wallet as an activity requiring a banking licence, as long as the private keys are deemed severable in a bankruptcy of the custodian. On the other hand, if the custodian was able to dispose of the virtual currency accounts without the beneficiaries' interaction, a banking licence would still be mandatory. Mere trading platforms matching sellers' and buyers' demands are not subject to regulatory oversight. In a recent statement, the Federal Council announced that it will swiftly pursue further regulatory measures in this field (ie, as to legal qualification at virtual currencies).

Securitisation

25 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?

Whereas no specific requirements apply for the execution of loan agreements (provided that the loan does not qualify as a consumer loan), the form requirement for security agreements depends on the required security. To perfect the security interest over the moveable asset, a physical transfer of possession to the lender is required (the borrower may not be in a position to solely exercise disposition (physically) over the asset). Provided that the perfection requirement for the respective security is complied with, there is no specific risk that the loan or security agreement would not be enforceable if entered into on a peer-to peer or marketplace lending platform. A marketplace lending platform may also act as a security agent for the lenders. Depending on the legal nature of the security interest, the security agent will either act in its own name (for the benefit of all secured parties) (in case of assignment or transfer for security purposes) or on behalf and in the name of all secured parties as direct representative (in the case of a pledge). If the security agent acts as a direct representative of the secured parties, it needs to be properly authorised and appointed by all other secured parties (such authorisation and appointment is usually included in the credit agreement or the terms of use of the marketplace lending platform). Such authorisation and appointment may have to be properly evidenced in writing in case of enforcement of the security.

26 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?

The assignment of loans is perfected by a written agreement between the peer-to-peer lending platform and the assignee. An electronically concluded assignment agreement would not be compatible with the perfection requirements. Notice to the borrower is not required in order to perfect the assignment and can be given at a later stage (eg, upon enforcement). However, in the absence of notification, the borrower can pay the assignor and thereby validly discharge its obligations. It

is likely, therefore, that the assignee will feel more secure if the borrower is notified (either immediately following the assignment or upon the occurrence of a specified trigger event) as it prevents a situation in which the borrower can validly discharge its obligation by payment to the assignor.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Yes. Notice to the borrower is not required in order to perfect assignment of the loan and can be given at a later stage (eg, upon enforcement). However, in the absence of notification the borrower can pay the assignor and thereby validly discharge its obligations. It is likely, therefore, that the assignee will feel more secure if the borrower is notified (either immediately following the assignment or upon the occurrence of a specified trigger event) as it prevents a situation in which the borrower can validly discharge its obligation by payment to the assignor. In the event of a ban of assignment, the borrower has to consent to the transfer; otherwise the transfer would not be valid.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Swiss Data Protection Law places limitations on the scope of the collection and use of personal information, as well as other types of information. The definition of 'personal information' – which covers any information that refers to a specific legal or natural person capable of being specifically identified – is sufficiently broad that the disclosure of information relating to accounts receivable and other assets will be restricted or prohibited. Care must therefore be taken to ensure that the requirements of this Law (eg, the processing of personal data must be proportionate (ie, necessary for the intended purpose and reasonable in relation to the privacy interest) and personal data may only be used for the purpose intended at the time of collection) are met, while ensuring that the special purpose company will have access to the information required to enforce its claims under the loans. Data protection rights may be waived by the borrower (such waiver is usually contained in the documentation of a peer-to-peer lending platform).

Intellectual property rights

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

In line with the WIPO Copyright Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights, computer programs are protected as copyrighted works under the Federal Act on Copyrights and Neighbouring Rights (the Copyright Act). The copyright vests in the author immediately upon creation of the work; there is neither a requirement nor a possibility to register copyrights. It is presumed that copyright pertains to the person whose name, pseudonym or distinctive sign appears on the copies or in conjunction with the publication of the work.

Further, computer-implemented inventions are eligible to patent protection under limited circumstances (see question 30). The patent is obtained upon registration and is protected for a period of 20 years from the filing date or an earlier designated priority date. Domestic patent applications are to be filed with the Federal Institute of Intellectual Property. Applicants domiciled in Switzerland may also file European patent applications with the Institute, with the exception of divisional applications.

Utility patents for minor technical inventions do not exist in Switzerland. However, since the requirements of novelty and non-obviousness are not examined ex officio during the process of domestic patent applications, domestic patents may be relatively easy to obtain but are also easy to challenge as instruments of protection.

30 Is patent protection available for software-implemented inventions or business methods?

For an invention to be patentable, it must be of a technical character; namely, it must incorporate physical interaction with the environment. Consequently, claims merely containing characteristics of computer software as such or of business methods transposed to a computer network are not eligible for patent protection. This difficulty arises because the European Patent Convention stipulates that 'schemes, rules and methods for doing business' and 'programs for computers' are not patentable.

Hence, while an abstract algorithm (eg, for collating or analysing data) is not patentable, the practical application of an algorithm dedicated to a specific technical field and generating a specific technical effect might be patentable. An example of a computer-implemented invention in the financial sector that was awarded protection in Switzerland on the basis of a European application is MoneyCat's patent of an electronic currency, an electronic wallet and electronic payment systems, that has been asserted against PayPal in patent litigation in the United States.

31 Who owns new intellectual property developed by an employee during the course of employment?

Under Swiss law, the ownership of employee inventions depends on the type of intellectual property created.

By virtue of article 332, paragraph 1 of the Swiss Code of Obligations (CO), patentable inventions or designs made in the course of employment and in performance of the employee's contractual obligations vest in the employer. The employer may also claim inventions created in the course of employment but unrelated to the employee's tasks by written agreement (article 332, paragraphs 2 and 3, CO), provided that the employee receives equitable compensation in consideration for the assignment of the invention (article 332, paragraph 4, CO).

In contrast to patents, copyright vests in the natural person who has created the work (ie, the author). As an exception to the rule, the commercial exploitation rights in computer programs developed by an employee in the course of employment belong to the employer (article 17, Copyright Act). On the other hand, developments that are unrelated to the employee's job description are not subject to such statutory assignment. Employers are therefore well advised to stipulate unambiguous assignment clauses in their employment contracts.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The concept of 'work for hire' is not enshrined in Swiss patent or copyright law. Hence, as a matter of principle, the copyright or right to the patent belongs to the developer. It is therefore essential to provide for adequate intellectual property assignment clauses in any contracts for work or services.

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

In the absence of an agreement regulating joint owners' exploitation rights in intellectual property, jointly owned intellectual property rights must not be prosecuted, used, licensed or otherwise disposed of without co-owners' consent. However, depending on the type of intellectual property right at stake, there are some exceptions:

- Each co-owner of a patent may independently transfer ownership of its share to a third party or institute proceedings against any infringer of the patent (article 33, paragraph 2, Patent Act).
- In the realm of copyright, co-owners must not unreasonably withhold their consent to the use of a collective work by a co-owner (article 7, paragraph 2, Copyright Act). If the contributions to a work are severable, each co-author may freely exploit his or her share, provided that the overall exploitation of the work is not negatively impacted thereby (article 7, paragraph 4, Copyright Act).

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

There is no exclusive right conferred on trade secrets and other valuable confidential business information as such. However, unauthorised disclosure or exploitation of corresponding information is sanctioned by virtue of unfair competition and criminal law. Pursuant to articles 5 and 6 of the Federal Act against Unfair Competition, the unfair exploitation of the achievements of others and the undue exploitation or disclosure of manufacturing or trade secrets are prohibited. Further,

the unauthorised obtaining of electronically stored data and industrial espionage are criminal offences.

Any evidence brought into the proceedings by a party is, in principle, accessible by the opposing party. Again, there are a few exceptions.

Upon request, the court will take appropriate measures to ensure that taking evidence does not jeopardise the legitimate interests of any of the parties involved or a third party, for example, business secrets contained in offered evidence.

In the course of a pretrial description of a product or process allegedly infringing upon a patent, the court will take the necessary measures to safeguard manufacturing or trade secrets, for instance by conducting the description ex parte only.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

The most important intellectual property right to protect branding is the trademark. Trademark protection can be obtained through national registration or designation in Switzerland via the Madrid System (Agreement and Protocol). Signs that belong to the public domain; are of a shape that constitutes the essential nature of the claimed goods or is otherwise technically necessary; are misleading; or are contrary to public policy, morality or the law are not susceptible to trademark protection. Recent examples of signs claiming trademark protection for financial services that were refused are Keytrader, which was admitted by the office but later nullified in civil proceedings for being descriptive, and the slogan 'Together we'll go far', because it was held to be overwhelmingly promotional and therefore insufficiently distinctive.

A trademark is valid for a period of 10 years from the date of application and may be renewed indefinitely for subsequent periods of 10 years each, provided that genuine use as a trademark has commenced, at the latest, five years after the date of registration. The trademark endows the owner with the exclusive right to prohibit others from using in commerce an identical or confusingly similar trademark.

Unregistered signs and trade dresses are capable of protection under unfair competition law, while company names benefit from a specific protection regime. Domain name registrations do not entail legal exclusivity rights per se, but earlier trademarks or trade names may constitute a claim for having a corresponding domain name transferred.

36 How can new businesses ensure they do not infringe existing brands?

The most effective and reliable method to ensure non-infringement of existing brands is an availability search encompassing both trademarks and company names. However, even if no conflicting registration is found, a new business may still encounter an infringement of unregistered brands that have already acquired some distinctiveness in the market owing to their constant factual use.

New businesses should also consider that the assumption of factual use of a brand without trademark registration may result in possible infringement of a later registration. However, the earlier adopter is entitled to continue using the brand to the extent used prior to the later filing of the third-party application.

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

The remedies available to owners or exclusive licensees of intellectual property rights are more or less harmonised for all categories of intellectual property rights and encompass injunctive relief; disclosure of information on the origin and the recipients of infringing goods or services; and damages. It is also possible to obtain preliminary injunctions, even ex parte, in case of urgency. If an ex parte injunction is granted, the defendant receives notice of such action upon service of the decision (article 265, paragraph 2, CPC), accompanied by either a summons to a hearing or an invitation to submit a writ in defence.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

The use of open-source software in the financial services industry is widespread and not specifically regulated in Switzerland. Concerns with respect to ensuing source code disclosures have largely evaporated, since the vast majority of open-source software licences do not foresee copyleft effect in the event the software is operated as a cloud service and no programming code is conveyed.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Swiss Federal Data Protection Act (FDPA) aims to protect personal data of both individuals and legal entities. The FDPA proclaims the following overarching principles of processing of personal data: transparency, purpose limitation, proportionality, data integrity and data security (article 7, FDPA). Notably, the FDPA does not per se require the data subject's consent or another justification for the processing of personal data. However, if personal data is being processed beyond said principles (eg, by way of collecting personal data without informing the data subject or despite his or her express objection), such activity infringes on the personality right of the data subject and consequently requires justification by an overriding public or private interest. In the wake of the adoption of the General Data Protection Regulation in the European Union (GDPR), the FDPA is currently being fundamentally revised with the aim of living up to the enhanced requirements imposed by the GDPR. Yet there are still no plans to introduce a general consent requirement.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

The FPDA does not specifically regulate financial information. In particular, financial data is not considered qualified sensitive data, in contrast to, for example, health information or information about criminal sanctions. Yet it is of particular importance that, according to case law, the information collected by a relationship manager in a bank's customer relationship management tool constitutes personal data, which the data subject is entitled to access at any time without having a specific interest.

Fintech companies regulated as banks are subject to a variety of requirements pertaining to the processing of customer-identifying data (CID). The same applies indirectly to fintech companies that are cooperating with banks and, as such, gain access to CID. First and foremost, every service provider in this field has to abide by the secrecy of bank customer data (article 47 of the Swiss Federal Law on Banks and Savings Institutions) and professional secrecy (article 43 of the Swiss Federal Act on Stock Exchange and Securities Trading). The applicable principles are further detailed in FINMA Circular 2008/21 regarding the operational risks of banks, which has undergone a substantial revision effective as of July 2017. Exhibit 3 of said Circular sets forth a number of principles and guidelines on proper risk management related to the confidentiality of CID stored electronically. For example:

- an inventory of the applications and infrastructure involved in the processing of CID must be kept and regularly updated;
- CID-related services must be provided from a secure environment;
- CID must be encrypted – if CID is stored or accessible from outside Switzerland, the ensuing risks must be mitigated expediently by way of anonymisation, pseudonymisation or at least effective encryption of the data;
- security breaches need to be investigated and notified to the regulator and customers as appropriate;
- staff having access to CID must be identified and monitored, and roles and scope of access rights must be narrowly defined; and
- the management is required to implement a cyber risk management concept, which also entails regular vulnerability assessments and penetration tests.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Anonymisation of personal data is a processing step that the data subject can, in principle, object to. However, the FDPA admits an overriding interest if personal data is being processed anonymously, in particular, but without limitation, for the purposes of research, planning and statistics. This ground for justification does not exclude data anonymisation and aggregation for commercial gain.

Update and trends

Given that the Swiss financial industry finds itself in the middle of far-reaching technological change, and since a dynamic fintech ecosystem may significantly contribute to the quality and the competitiveness of Switzerland's financial centre, the Swiss Federal Council decided to ease the regulatory framework for providers of innovative financial technologies in November 2016. As a result, the FDF presented the 'FinTech Strategy Switzerland' as a form of deregulation with three supplementary elements, of which the first two entered into force on 1 August 2017:

- First, the deadline for holding (fiat) money in settlement accounts will be prolonged from seven to 60 days. Credit balances on settlement accounts with the exclusive purpose of serving the settlement of client transactions, with no interest paid on the funds and provided that transfer is executed within seven days upon crediting of the funds, are not considered to be deposits under the banking regulation. Companies accepting funds for settlement on behalf of the clients do not require a banking licence (but are subject to anti-money laundering rules). For many years it has been unclear how long client money may remain on the settlement account before being transferred to the beneficiary. According to the latest ruling practice of FINMA, the time frame had been set to seven days, as stated above. The extension of the settlement time frame represents a significant advantage mainly for crowdfunding and crowdlending platforms.
- Second, a company may accept deposits in a total value of 1 million Swiss francs without the need to obtain a banking licence from FINMA (regulatory sandbox). As explained in question 1, a company, in the past, was able to accept deposits from up to 20 people without triggering banking licence requirements. The new regulation will now no longer look at the number of clients but the value of client assets held by such company. In the event deposits of not more than 1 million Swiss francs are held by a company, no banking licence will be required. Interestingly enough, this deregulation opens up more opportunities for lending platforms than for other fintech companies. In the past, FINMA has ruled that a private individual would be deemed a bank in the event he or she is taking out a consumer loan facing more than 20 investors that acquire a tranche of the loan via the lending platform. A lending platform could therefore split the loan among 20 investors only. Since 1 August 2017, a participation of the loan among an unlimited number of investors will be permissible provided that the loan amount will not exceed 1 million Swiss francs. It is noteworthy that the sandbox will only relieve from banking regulation but not from the requirement to comply with anti-money laundering regulation.
- Third, a banking licence 'light' should be introduced, which allows a company to accept deposits up to 100 million Swiss francs provided that the funds will not be invested nor subject to interest payments to the company. This new licence should be paired with a loosening of the licensing process and account, auditing and regulatory capital requirements.

Unfortunately, the implementation of the latter new banking licence 'light' has been shelved for the time being. It is now expected to be implemented with the Financial Services Act and the Financial Institution Act scheduled for 2019 (the Financial Services Act aims to introduce equivalent rules to the European Markets in Financial Instruments Directive). There are some doubts as to whether there will be demand for a licence category that allows for holding but not investing money. It would be welcomed if the National Council, which will debate the Financial Institution Act in the autumn of 2017, extended the permitted business activities of companies benefiting from this new option and turned it into a real fintech licence. Such fintech licence should, inter alia, allow for the creation and issuance of tokens against fiat money, investing in the creation of new protocols and having token holders benefiting from the returns without such payments being subject to Swiss withholding tax. If not structured properly, initial coin offerings (ICO) may trigger Swiss withholding tax of 35 per cent on payments to token holders should such ICO be deemed as collective fundraising under Swiss tax law.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing by financial services companies is widespread, especially with small innovators and, to a lesser extent, established financial institutions collaborating with fintech companies.

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

There is no specific regulation with respect to the use of cloud computing. However, two FINMA circulars need to be observed.

FINMA Circular 2008/07 applies to 'significant outsourcings'. If a bank complies with the requirements set forth in the Circular, it may outsource significant business segments without having to obtain an approval from FINMA. Several rules of Circular 2008/7 address cross-border outsourcing, where the emphasis is on the safeguarding of regulatory oversight by FINMA and on compliance with Swiss legislation relating to banking secrecy, data protection and data security.

Exhibit 3 of FINMA Circular 2008/21 sets forth a number of principles and guidelines on proper risk management related to the confidentiality of CID stored electronically (see question 40). In particular, the bank must know where CID is stored, by which applications and systems it is processed and through which channels it may be accessed.

These rules would generally be imposed contractually on fintech companies collaborating with banks.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

Machine-to-machine data transmissions are regulated as telecommunications services. Depending on how these services are structured, a financial services company facilitating value transfers through the internet of things could be treated as a regulated service provider. Regulatory challenges arise in particular when Swiss addressing resources are predominantly used to cater for businesses abroad.

Tax

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

No tax incentives or other schemes are directed specifically at supporting or benefiting fintech companies and investors to encourage innovation and investment in the fintech sector. However, Swiss fintech companies generally benefit from a favourable tax environment with corporate income tax rates as low as just under 12 per cent (depending on the exact location within Switzerland) and an ordinary VAT rate of only 8 per cent. In addition, resident investors typically benefit from the following (general) exemptions provided for in the Swiss tax system:

- Swiss-resident corporate investors: capital gains from the sale of equity investments of at least 10 per cent held for at least one year are virtually tax-free for Swiss-resident corporate shareholders, under the participation exemption. The participation exemption also applies to dividends received from equity investments of at least 10 per cent or worth at least 1 million Swiss francs.
- Swiss-resident individual investors: gains realised on the sale (or any other disposition) of equity investments are generally tax-free for Swiss-resident individual shareholders. The same is true for (privately held) equity investments made through tax transparent collective investments vehicles (ie, funds) and non-commercial limited partnerships.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

The focus of competition law in financial technology has traditionally been on agreements regarding the fixing of interchange fees in multilateral payment schemes involving several issuers and acquirers. It is likely that the principles established in the credit card sector will be transposed to other forms of cashless payment processing. According to the most recent practice of the Swiss Competition Commission

(ComCo), the merchant indifference test prevails. Pursuant to this test, the benchmark for determining the amount of a uniformly applied interchange fee would be the transactional benefits enjoyed by merchants relative to cash payments (ComCo decision of 1 December 2014 regarding Credit Card Domestic Interchange Fees II).

Recently, an additional competition law topic surfaced in the mobile payments domain: owing to the entry of ApplyPay in Switzerland, third-party mobile payment solution providers are claiming access to iPhone's nearfield communication interface. Such access has so far been denied by Apple. ComCo has said that it will observe the further development of the market before taking any regulatory action.

Financial crime

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

Even though the implementation of internal procedures on bribery is not required, Swiss fintech companies are often subject to anti-money laundering regulation.

The Act on Combating Money Laundering and Terrorist Financing (AMLA) foresees obligations of diligence for any persons subject to its scope of application, including the independent asset manager. These obligations aim to prevent money laundering and include the verification of the identity of the contracting party and the identification of the economic beneficiary, the renewal of such verification of the identity and specific clarification duties. The fintech company must apply the respective regulation provided for by FINMA or the self-regulatory organisation it is affiliated with.

The AMLA also defines documentation and organisational responsibilities as well as an obligation to communicate money laundering suspicions to the MROS. Further obligations include blocking the client's accounts in suspicious cases and not informing the client of the communication to the MROS.

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

There is no specific regulatory or industry anti-financial crime guidance for fintech companies except for the general anti-money laundering regulation.

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