Fintech

Contributing editors
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2019

GETTING THE DEAL THROUGH

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2016
Third edition
ISBN 978-1-78915-024-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Fintech*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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.gettingthedealthrough.com.

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.

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.

GETTING THE DEAL THROUGH

London
August 2018

Switzerland

Michael Isler and Thomas Müller
Walder Wyss Ltd

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 which 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 an amount of at least 500 million Swiss francs (as an 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 which 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 should 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, the 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. It 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 (P2P) 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 automated investment advice in your jurisdiction.

There are no specific rules or regulation applicable on automated investment advice. FINMA regards innovation as key to the competitiveness of Switzerland's financial centre but adopts an essentially neutral approach to certain business models and technologies. It therefore has recently reviewed whether specific provisions in its ordinances and circulars disadvantaged some technologies and concluded that very few such obstacles existed. As a consequence of this review, it has adopted its guidelines for asset management and has removed the requirement that asset management agreements have to be concluded in writing. Also, FINMA has eased the rules on the on-boarding process of new business via digital channels.

11 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.

12 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.

13 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.

14 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.

15 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.

16 Does the regulator in your jurisdiction make any specific provision to encourage the launch of new banks?

FINMA grants new banking licences provided that the requirements are met. As part of the FinTech Strategy Switzerland from the Federal Department of Finance (FDF), a new banking licence 'light' should be introduced in 2019 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. The banking licence 'light' may be turned into a full banking licence by the company provided that all conditions of a banking licence are met.

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

Natural persons or legal entities acquiring a direct or indirect qualified participation of at least 10 per cent in a Swiss-regulated financial institution have to be approved by FINMA before the closing of the acquisition. The investor has to show that its influence will not have any negative impact on the regulated financial institution's prudent and sound business activity. Qualified shareholders must enjoy a good personal and professional reputation, similar to persons in charge of the regulated financial institution's supervision and management.

18 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 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 of 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, the introduction of a banking licence 'light' (see question 16).

These two fintech-related elements have been introduced as of 1 August 2017. The third element of the FinTech Strategy Switzerland is expected to be enacted at the beginning of 2019.

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

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.

20 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 2020. 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.

21 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.

22 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 with a physical presence in Switzerland require a licence in Switzerland even if they serve investors or 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.

23 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.

Distributed ledger technology

24 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

25 Are there any legal or regulatory rules or guidelines applicable 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).

26 Are there any rules or guidelines relating to the operation of digital currency exchanges or brokerages in your jurisdiction?

The exchange of a cryptocurrency into fiat money or into any different cryptocurrency is subject to anti-money laundering regulation in Switzerland. The same would apply to entities providing token transfer services, if such service providers maintain the private key (eg, a custody wallet provider). On the other hand, intermediaries on the secondary market do not fall under the Swiss Financial Market Infrastructure Act and do not require a securities dealer licence. The underwriting and public offering of digital assets which qualify as securities (see question 27) and which are issued by third parties on the primary market, are, if conducted in a professional capacity, activities that require a securities dealer licence.

27 Are there legal or regulatory rules or guidelines in relation to initial coin offerings (ICOs) or token generating events in your jurisdiction?

On 16 February 2018, FINMA published new guidelines (the Guidelines) for enquiries regarding the regulatory framework for initial coin offerings (ICOs). The Guidelines follow a first communication

by FINMA on the same topic published on 29 September 2017. First, the purpose of the Guidelines is to inform market participants of the information required for FINMA to issue non-action letters and on the ruling process in general. Second, and more interestingly, FINMA puts forward its own classification of tokens in three different categories, but fails in defining clear demarcation lines that would enhance legal certainty for ICO organisers. FINMA identifies three token categories in its Guidelines:

- Payment tokens (cryptocurrencies): 'Payment tokens are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value transfer. Cryptocurrencies give rise to no claims on their issuer.'
- Utility tokens: 'Utility tokens are tokens which are intended to provide access digitally to an application or service by means of a blockchain based infrastructure.'
- Asset tokens: 'Asset tokens represent assets such as a debt or equity claim on the issuer. Asset tokens promise, for example, a share in future company earnings or future capital flows. In terms of their economic function, therefore, these tokens are analogous to equities, bonds or derivatives. Tokens which enable physical assets to be traded on the blockchain also fall into this category.'

According to the Guidelines, the issuance of payment tokens constitutes the issuing of a means of payment, provided that the tokens may be transferred from one holder to another holder on the blockchain infrastructure. Anyone who provides payment services or who issues or manages a means of payment is deemed a financial intermediary subject to Swiss anti-money laundering regulation. A financial intermediary subject to Swiss anti-money laundering regulation has either to affiliate with a self-regulatory organisation (SRO) or submit to the direct supervision of FINMA for anti-money laundering purposes. Also, it has to identify the contractual counterparty and the beneficial owner of the assets. The identification may be executed via digital channels in accordance with the FINMA Circular 2016/7, 'Video and online identification'. This circular is currently subject to revision. FINMA intends to implement further easings on the identification process. When it comes to the application of the said anti-money laundering requirements on ICO organisers, the Guidelines foresee an important easing. According to FINMA, the ICO organiser should comply with the regulation if it accepts the funds via a third-party service provider which is affiliated with an SRO or subject to FINMA supervision. However, the ICO organiser would not have to affiliate with an SRO or to be licensed directly by FINMA itself.

The issuance of utility tokens will not be subject to anti-money laundering regulation, provided that the main functionality of the token is the access right to a non-financial application of the blockchain technology. As mentioned above, many utility tokens may also be a means of payment in consideration for a service provided on the respective platform. In order not to undermine the token categorisation of FINMA, it would be fair to say that the payment function will, by default, be an accessory function of any utility token. Otherwise, the issuance of virtually all utility tokens would be subject to Swiss anti-money laundering regulation.

Asset tokens generally carry the right of participation in the future earnings of a company or in the future capital cash flow. FINMA generally qualifies such tokens as securities. Securities are standardised certificated and uncertificated securities, derivatives, and intermediated securities which are publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, provided that they have not been created especially for individual counterparties. Uncertificated securities are rights which are based on a common legal basis and issued under identical terms. According to the Swiss Code of Obligations, uncertificated securities are created with the entry in the book and continue to exist only in accordance with such entry. FINMA follows our firms's previously published view that uncertificated securities can be recorded on the blockchain. The entry on the blockchain constitutes the required book on uncertificated securities. The public offering of uncertificated securities which represent a debt or equity right is subject to prospectus requirements according to the Swiss Code of Obligations. The disclosure requirements for a Swiss prospectus are fairly low. The prospectus does not have to be registered or approved by FINMA or any other authority for the time being. The required Swiss disclosure wording can be implemented into a White Paper used in ICOs. Prospectus requirements applicable in each jurisdiction where investors are solicited must be adhered to as well. However, underwriting and publicly offering securities of third parties on the primary market, is, if conducted in a professional capacity, an activity which requires a securities dealer licence.

Securitisation

28 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 movable 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 this 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 P2P 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.

29 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? May these loans be assigned without informing the borrower?

The assignment of loans is perfected by a written agreement between the P2P 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.

30 Will the securitisation be subject to risk retention requirements?

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.

31 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 a waiver is usually contained in the documentation of a P2P lending platform).

Intellectual property rights

32 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 33). 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.

33 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. This limitation is of particular relevance in the relatively new field of inventions pertaining to distributed ledger technology (blockchain). Given the widespread open source character of the underlying protocols, the vast majority of blockchain-based innovation will not only lack a technical effect, but also a novelty or inventive step.

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 US.

In the blockchain domain, a patent that has been awarded protection in Switzerland in April 2018 is nChain Holding's 'Registry and automated management method for blockchain-enforced smart contracts'.

34 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.

35 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.

36 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).

37 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 pre-trial 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.

38 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 relatively new phenomenon to be observed are trademark applications designating cryptocurrencies or other blockchain-based assets.

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.

39 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.

40 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.

41 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

42 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, being specified that this revision process is still currently open-ended with no scheduled date of entry into force of the revised FDPA. In spite of the intended alignment with the GDPR requirements, there are still no plans to introduce a general requirement of consent or other ground for permitting data processing. Despite this delay, it is very unlikely that Switzerland will lose its adequacy status as a country featuring an equivalent level of data protection during the transition period.

43 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 this 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.

44 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.

Outsourcing, cloud computing and the internet of things

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

FINMA Circular 2018/3 applies to 'significant outsourcings' performed by banks, securities dealers and insurances companies. If a bank or securities dealer complies with the requirements set forth in the Circular, it may outsource significant business segments without having to obtain an approval from FINMA. In relation to insurance companies, however, the outsourcing of significant functions and the partially admissible outsourcing of control functions are considered relevant to the business plan and therefore require authorisation by FINMA.

Outsourcing within the meaning of the Circular occurs when a company mandates a service provider to perform all or part of a

Update and trends

One theme has dominated the fintech discussion in the last year and overshadowed any other emerging trends was ICOs, also known as token generation events. Switzerland, and in particular the region in and around the city of Zug, promoted as 'CryptoValley', has turned into a hub of companies organising token sales as well as service providers helping them achieve these goals. On 16 February 2018, FINMA published new guidelines on the application of the financial market legislation on ICOs. Inter alia, FINMA puts forward its own classification of tokens into three different categories, namely, payment tokens (cryptocurrencies or virtual currencies), utility tokens and asset tokens. It also creates an umbrella category of pre-functional investment tokens qualifying as securities under Swiss law.

While the issuance of payment tokens is subject to anti-money laundering regulations, the sale of self-generated uncertificated securities on the primary market is essentially unregulated. On the other hand, trading in crypto assets, which qualify as securities on the secondary market, requires a securities dealer licence under Swiss law.

Apart from the activities of the financial market regulator, two initiatives on the political level are noteworthy. First, the State Secretariat for International Financial Matters has established a blockchain/ICO working group. Its task is to review the existing legal framework and identify any need for legislative action. Its report is expected to be published by the end of 2018. Second, a blockchain taskforce was formed as a private initiative, but under the patronage of two federal councillors. The taskforce published a first report in April 2018 showing preliminary results of their analysis in the fields of regulatory treatment of ICOs, banking and cybersecurity.

Although much legal uncertainty remains, ICOs keep playing an increasingly important role when it comes to entrepreneurial financing. Thanks to the constructive and innovation-friendly approach of FINMA, a generally favourable tax regime and political support, Switzerland remains an attractive jurisdiction for organising ICOs.

function that is significant to the company's business activities independently and on an ongoing basis. Direction, supervision and control by the supreme governing body, central executive management functions and functions that involve strategic decision-making may not be outsourced, nor may decisions concerning the commencement and termination of business relationships. On the other hand, operational risk management and compliance tasks may be outsourced, which is important for the emerging 'RegTech' segment.

Significant functions are those that have a material effect on compliance with the aims and regulations of financial market legislation. The determination of whether or not an outsourcing is 'significant' must be made by the financial institution on a principle-based approach. While the predecessor of the Circular 2018/3 (ie, Circular 2008/07) contained a list of outsourcing examples deemed 'significant', the revised guideline deliberately pursues a principle-based approach. In case of doubt, financial institutions tend to qualify outsourcings as significant though. This particularly applies if the service provider gets access to CID.

46 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 much lesser extent, established financial institutions collaborating with fintech companies.

47 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, the two pertinent FINMA circulars need to be observed.

Several rules of Circular 2018/3 address cross-border outsourcing, where the emphasis is on the safeguarding of regulatory oversight and auditability by FINMA; in general, the outsourcing of a function to another country must not make supervision by FINMA more difficult. The Circular takes account of the particularities of cloud computing in these respects. First, auditing of the service provider's compliance with supervisory regulations may be delegated to the service provider's auditors, provided these are adequately qualified and the ensuing report be supplied, on request, to FINMA as well as to the financial institution's internal auditors and audit firm. Second, although the Circular stipulates that access to the information required for purpose of restructuring or resolving the outsourcing company must be possible in Switzerland at all times, it is worth noting that this does not entail any data residency requirements; it suffices in our opinion to ensure that such data be accessible from Switzerland.

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 43). 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.

48 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

49 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 7.7 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.

A lot of dynamism and willingness by tax authorities to foster a tax-friendly environment can be observed in the field of taxation of entities organising ICOs, both on a cantonal (mitigation of corporate income tax levied on ICO proceeds) and federal level (avoidance of Swiss withholding tax levied on disbursements to investors). While the payment of the token holders to the issuing company is generally treated as income for accounting purposes at the level of the company, the company should be allowed to record provisions in the same amount as the received funds neutralising the income from issuing the tokens. Such provisions are generally justified as the issuing company is obliged to use the proceeds for the development of a new technology. As such development leads to tax-deductible expenses at the level of the issuing company and is directly linked to the income from the issuance of the token, the income should be neutralised by a provision for these future expenses. However, the actual acceptance of the provisions depends on the individual case and should be cemented by a tax ruling.

Competition

50 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 due by the acquirer to the issuer in multilateral payment schemes involving several issuers and acquirers. According to the practice of the Swiss Competition Commission (ComCo), the merchant indifference test prevails in the credit card sector. Pursuant to such 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). In the domain of debit cards, ComCo is more reluctant to approve a need for levying interchange fees, but recently acknowledged it in order to stimulate market penetration of new products or new online and mobile payment channels.

An additional competition law topic surfaced recently in the mobile payments domain: owing to the entry of ApplePay 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, although there are indications that some restrictions may be gradually lifted in the nearer future. ComCo has said that it will observe the further development of the market before taking any regulatory action.

Financial crime

51 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. These regulations unequivocally apply to companies issuing or dealing with the safekeeping or exchange of virtual currencies.

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.

52 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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Restructuring & Insolvency
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ISBN 978-1-78915-024-7