

International **Comparative** Legal Guides



Practical cross-border insights into digital business law

Digital Business **2022**

Third Edition

Contributing Editors:

James Gill & Victor Timon
Lewis Silkin LLP

ICLG.com

Expert Analysis Chapters

1

De-risking Digital Business Dreams
James Gill, Lewis Silkin LLP

5

Modern Slavery: A “Wicked Problem” that Requires a Human Rights-Based Approach
Anne O'Donoghue & Palwasha Nawabi, Immigration Solutions Lawyers

Q&A Chapters

16

Brazil
Mattos Filho: Fabio Ferreira Kujawski, Lisa Worcman,
Paulo Marcos Rodrigues Brancher &
Thiago Luis Sombra

26

Cyprus
E & G Economides LLC: Xenia Kasapi &
George Economides

34

France
Armengaud Guerlain: Catherine Mateu

45

Germany
SKW Schwarz: Dr. Christoph Krück, Franziska
Ladiges, Alexander Möller & Heiko Wunderlich

53

India
G&W Legal: Disha Mohanty, Arjun Khurana &
Meghna Arora

62

Indonesia
Bagus Enrico & Partners: Enrico Iskandar,
Debu Batara Lubis & Alwin Widyanto Hartanto

71

Ireland
Lewis Silkin LLP: Victor Timon

83

Italy
Portolano Cavallo: Irene Picciano, Donata Cordone,
Fabiana Bisceglia & Eleonora Curreli

93

Japan
Anderson Mōri & Tomotsune: Ken Kawai &
Takashi Nakazaki

101

Korea
D'LIGHT Law Group: Iris Hyejin Hwang &
Kyoung Min Pyo

107

Saudi Arabia
Hammad & Al-Mehdar Law Firm: Suhaib Hammad

114

Sweden
Synch: Jim Runsten & Norea Normelli

120

Switzerland
Walder Wyss Ltd: Jürg Schneider, Hugh Reeves,
Emilia Rebetez & Maria Gentile

129

Taiwan
Lee and Li, Attorneys-at-Law: Robin Chang &
Eddie Hsiung

136

Thailand
Kudun and Partners: Kongkoch Yongsavasdikul,
Koraphot Jirachocksubsin & Suchaya Tangsiri

142

United Kingdom
Borges Salmon LLP: Andrew Dunlop,
Matthew Loader, Liz Smith & Laura Craig

152

USA
Cozen O'Connor: Victor J. Castellucci

Switzerland

Walder Wyss Ltd



Jürg Schneider



Hugh Reeves



Emilia Rebetez



Maria Gentile

1 E-Commerce Regulations

1.1 What are the key e-commerce legal requirements that apply to B2B e-commerce in your jurisdiction (and which do not apply to non-e-commerce business)? Please include any requirements to register, as well as a summary of legal obligations specific to B2B e-commerce.

Swiss law contains very few provisions on e-commerce in a B2B context. There is no dedicated e-commerce law as may exist in other jurisdictions.

The most relevant rules applicable to e-commerce players are included in the Federal Unfair Competition Act (UCA). Article 3 para. 1 litt. s UCA indeed requires that anyone offering goods, works or services by means of electronic commerce must: (i) indicate in a clear and complete manner its identity and contact address, including e-mail address; (ii) indicate the different technical steps leading to the conclusion of a contract; (iii) provide the appropriate technical tools allowing the detection and correction of any incorrect inputs prior to despatch of an order; and (iv) confirm without delay and by e-mail the client's order. Article 3 para. 1 litt. s UCA, however, applies to B2B and B2C e-commerce alike.

From a contracts law standpoint, Swiss law is generally permissive, granting a broad contractual freedom to the parties. This is particularly true in B2B relationships where, save for a few exceptions, the contracting businesses have a lot of liberty to define the contents and provisions of their agreement and are not bound by formal requirements.

Further rules apply to B2B e-commerce actors, such as requirements against certain types of advertising and marketing behaviour, though these rules are neither specific to B2B businesses nor to e-commerce activities. Therefore, these rules will not be discussed unless specifically addressed hereafter.

1.2 What are the key e-commerce legal requirements that apply to B2C e-commerce in your jurisdiction (and which do not apply to non-e-commerce business)? Please include any requirements to register, as well as a summary of legal obligations specific to B2C e-commerce.

Similarly to the situation discussed above concerning B2B e-commerce, few rules apply specifically to B2C e-commerce.

As mentioned above, the requirements of Article 3 para. 1 litt. s UCA are of particular relevance for e-commerce businesses, both as regards B2B and B2C. The UCA also prohibits the use of abusive general terms and conditions which contain

provisions that go against the rules of good faith and put the consumer at a disproportionate and unjustified disadvantage (it being specified that there are no content requirements for general terms and conditions). Moreover, the Federal Ordinance on Price Indication (PIO) applies to whomever offers or advertises goods or services to consumers, it being specified that a consumer is defined as any person who purchases goods or services for purposes not related to his/her commercial or professional activity. Under the PIO, sellers who sell to consumers must indicate the effective price, in Swiss francs, including VAT and any other taxes or fees (copyright fees, waste disposal costs, etc.). The seller must also state the unitary price for measurable goods (and detail price for any pre-wrapped goods), though some exceptions apply, for instance when sale is based on weight or length. In specific sectors, some additional rules apply (e.g. for package travel offers or for products that may be relevant from a product safety standpoint). Note, however, that the PIO also applies to offers and advertisements to consumers in a non-e-commerce situation.

Contrary to many foreign jurisdictions (especially the EU and the USA), Swiss law does not contain many rules to protect consumers in an e-commerce setting. Indeed, consumer protection is – arguably – still not a Swiss speciality and remains in a rather embryonic stage of development, despite ongoing pressure from consumer protection organisations and legal scholars, as well as a specific act on consumer information. For instance, Swiss law does not have a general withdrawal right, though it is more and more frequently found in the general terms and conditions of Swiss-based e-commerce platforms active in the European Union or in direct competition with EU-based platforms. Furthermore, Swiss law does not have any provisions on maximum delivery dates. That said, as of 1 January 2022, Swiss unfair competition legislation strongly limits geographic limitations in the e-commerce context and seeks to prohibit geo-blocking practices, though the exact scope and impact of this new legislation remains to be seen. Moreover, also as of 1 January 2022, new provisions of the Swiss Cartel Act prohibit dominant undertakings and those with relative market power from limiting the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned; this, too, is expected to bring down prices along the supply chain, resulting in lower prices for local consumers.

In addition, Swiss private international law and Swiss civil procedure law do contain certain provisions that strengthen the consumer's position. In contracts with consumers, both in international and purely domestic relationships, the contracting parties cannot contractually waive beforehand (including in any general terms and conditions) the consumer's right to bring a

court claim before the courts of his/her place of domicile or habitual residence. Moreover, under Swiss private international law, in international relationships, the parties cannot waive the applicability of the law of the state of the consumer's place of habitual residence if: (i) the supplier received the order in that jurisdiction; (ii) the conclusion of the contract followed an offer or advertisement in that jurisdiction and the consumer performed the necessary steps towards contracting in that jurisdiction; or (iii) the consumer was enticed by the supplier to go to another country in order to put in an order. Switzerland is bound by further specific court competency rules (the so-called "Lugano Convention") with EU and EFTA states; these rules are substantially the same as the general private international rules outlined above and seek to ensure that consumers retain access to their local courts.

2 Data Protection

2.1 How has the domestic law been developed in your jurisdiction in the last year?

The data protection legal landscape in Switzerland has been rather dynamic over the past few years. In light of developments at the European and international levels, the Swiss legislator decided to revise the Federal Data Protection Act (FDPA). This revision has been completed and the revised law should enter into force on 1 September 2023. The revision aims to align with the standards under the General Data Protection Regulation (GDPR) ensuring an adequate data protection level not only within Switzerland but from an EU perspective as well.

Under the current FDPA, and somewhat unusually by international comparison, personal data of legal entities are protected to the same extent as those of individuals, which can lead to more extensive data protection compliance obligations for e-commerce businesses. However, the revised FDPA will do away with this specificity.

The current FDPA has garnered the reputation of being a "paper tiger" due to its relatively low penalties, as it only provides for an amount of CHF 10,000 in certain cases of breaches; in the revised FDPA this will be expanded and increased to CHF 250,000.

Lastly, considering the international environment of digitalisation, the revised FDPA – similarly to Article 3 GDPR – also has specific provisions regarding its (extra-)territorial scope. Foreign-based entities will be subject to the revised FDPA if and to the extent their data processing has an impact on the Swiss territory, namely when services are offered to Swiss-based customers or any related processing is taking place in Switzerland.

2.2 What privacy challenges are organisations facing when it comes to fintech, retail, AI and digital health?

As regards general data protection principles, transparency requirements are of central importance, especially if an organisation resorts to AI in the course of its activities. Transparency reflects a particular challenge in this field as data are, to a large extent, collected from various separate sources, processed on an aggregate basis and mostly based on algorithms or other technology. This often makes it difficult for organisations to provide full transparency to their data subjects.

Moreover, given that the personal data that fintech and digital health businesses process may often qualify as sensitive data or lead to personality profiles, there is a heightened potential risk for the affected data subjects. In addition, strict standards that apply to outsourcing or cross-border data transfers, as well as

data security considerations, are prime concerns for digital businesses. Indeed, they tend to be internationally active and amass significant quantities of personal data and, as the case may be, sensitive personal data. These businesses, even if they are relatively small in size, therefore need to proactively ensure that they meet the requirements of data protection legislation and provide at all times a high level of data security.

2.3 What support are the Government and privacy regulators providing to organisations to facilitate the testing and development of fintech, retail, AI and digital health?

The Swiss government as well as the Federal Data Protection and Information Commissioner (FDPIC) have a significant interest in supporting actors operating in these fields. Much of this support is currently taking place through government-backed research, which may lead to regulatory changes.

In 2018, the government published its strategy for national digital developments – the "Digital Switzerland" strategy – addressing various issues in relation to the ongoing digitalisation, such as for instance the challenges of decision-making based on machine learning and algorithm methodology. In this context, the government appointed a working group tasked with identifying upcoming issues in the field of AI and analysing the need for specific steps in data-driven sectors. Conversely, the government has drafted an eHealth strategy addressing key issues such as the handling of digital patient data as well as the use of AI and machine learning (e.g. robotic technologies).

The FDPIC has published multiple statements and non-binding guidelines on how to address data protection matters in these areas.

Further, sector-specific regulations address particular data protection issues. For example, the Swiss Financial Market Supervisory Authority (FINMA) issued binding guidelines on outsourcing and data security for the financial and insurance sector. eHealth – a public organisation established by the federal and cantonal authorities – has published several factsheets and other guidance on how to deal with electronic health data.

3 Cybersecurity Framework

3.1 Please provide details of any cybersecurity frameworks applicable to e-commerce businesses.

Switzerland does not have dedicated cybersecurity legislation. Rather, cybersecurity is primarily a subset of data protection legislation and is therefore governed by the rules on data protection and data security. These rules are relatively general. For instance, there is (at the time of writing) no general data breach notification requirement. As the rules are technologically neutral, the legislation avoids discussing the use of one specific technology. However, cybersecurity is a central concern of the Swiss government and is frequently discussed and analysed in governmental reports and national strategies. Because Swiss data protection legislation sets a comparatively high bar, data security and cybersecurity are generally adequately ensured; this has so far comforted the legislator in not venturing into drafting any *ad hoc* cybersecurity legislation.

3.2 Please provide details of other cybersecurity legislation in your jurisdiction. If there is any, how is that enforced?

Anyone who processes personal data must implement technical and organisational measures to protect this data, in particular

against any accidental or unauthorised destruction, accidental loss, technical faults, forgery, theft or unlawful use. These technical and organisational measures include a variety of checks or controls, such as controls over who has access to or receives personal data, storage controls, usage controls and so forth. Swiss data protection and data security regulations do not, however, require implementation of a specific technical standard, given the legislation's technological neutrality, though many actors implement international standards (e.g. ISO 27001) as a matter of good business practice.

Enforcement is essentially within the remit of the above-mentioned FDPIC. Though the FDPIC's current enforcement powers are somewhat limited, this will change with the advent of the revised data protection legislation, pursuant to which the criminal prosecution authorities will be able to impose fines of up to CHF 250,000. Moreover, other sectoral authorities and regulators may have enforcement powers in certain specific cases (for instance, the Office of Communications (OFCOM) or FINMA).

4 Cultural Norms

4.1 What are consumers' attitudes towards e-commerce in your jurisdiction? Do consumers embrace e-commerce and new technologies or does a more cash-friendly consumer attitude still prevail?

Consumers have an overall positive attitude toward e-commerce and online shopping. According to statistics, Switzerland consistently ranks highly as regards the percentage of the population performing online purchases. Moreover, e-commerce has enjoyed uninterrupted growth over the past few years, further bolstered by the COVID-19 pandemic and the resulting shift in consumption habits. According to a joint study by the Zurich University of Applied Sciences, the Zurich School of Management and Law and the Management Center Innsbruck, the total amounting from online purchases in 2021 reached CHF 15 billion (it being noted that different studies reach slightly different numbers and results), which constitutes a 50% increase as compared to the pre-pandemic year of 2019. Consumer electronics as well as fashion and clothing items constitute the bulk of online sales to consumers, though the garden and DIY categories have seen the strongest growth throughout the pandemic. Consumers can also access foreign online sellers (albeit with some *de facto* barriers, see hereafter the answer to question 10.1) and purchases from businesses based outside of Switzerland (primarily in Germany and France) account for approximately one quarter of B2C purchases. This has resulted in downward pressure on prices practised by Swiss-based businesses, as well as a broader diversification of the online offering of goods and services.

Despite the above, e-commerce remains a relatively new concept for Swiss-based consumers and businesses alike and is therefore expected to continue to gain traction across the board over the next years. This is particularly true for certain categories of goods, such as foodstuffs, which have not yet properly penetrated the e-commerce landscape.

4.2 Do any particular payment methods offer any cultural challenges within your jurisdiction? For example, is there a debit card culture, a direct debit culture, a cash on delivery-type culture?

Swiss buyers are in general open to cashless payment methods, though payments against invoices remain an important means of payment. Credit cards and payment services (e.g. PayPal) are popular. In particular, the use of credit cards, which frequently

come at an additional cost for the buyer, has profited from the intervention of the Swiss Competition Commission which, in recent years, took measures to progressively, yet strongly, reduce the interchange fees (fees due to credit card issuers which were frequently levied on the end customer by merchants). In addition, mobile payment methods have been enjoying growing popularity, especially among younger age groups. Direct debit, debit card and cash on delivery are, on the other hand, not the most sought-after payment methods, and online businesses do not systematically provide those options.

4.3 Do home state retailer websites/e-commerce platforms perform better in other jurisdictions? If so, why?

Local e-commerce retailers and platforms tend to focus on the Swiss internal market. Indeed, one of the Swiss industry's concerns is the preservation and, where possible, increase of the foothold of local businesses. This is because foreign-based businesses are frequently able to offer similar or identical goods at a more competitive price-point. With some noteworthy exceptions, local sellers are currently not performing well outside of the country in comparison to many e-commerce businesses based abroad.

There have been recurring attempts to introduce online labels aimed at highlighting the Swiss origins of e-commerce platforms and their offerings. However, in many cases such e-commerce labels have proven disappointing (as can be seen from the now-defunct "Webtrader" label or the "e-comtrust" label, the latter of which, however, remains in existence).

4.4 Do e-commerce firms in your jurisdiction overcome language barriers to successfully sell products/services in other jurisdictions? If so, how and which markets do they typically target and what languages do e-commerce platforms support?

The use of varied languages is a strength of many Swiss e-commerce platforms. Swiss e-commerce platforms frequently use several languages, namely German, French, Italian and often English. Interestingly, though German, French and Italian are the official Swiss languages (a fourth official language being the seldom-found Rhaeto-Romance), one or several of these languages – usually Italian, and occasionally French – are left out or substituted by English. The use of English offers a double advantage: firstly, it allows businesses to target customers outside of Switzerland in countries which do not speak German, French or Italian; and second, it allows these businesses to avoid internal language barriers (and related translation costs) and also to target the sizeable international community within Switzerland.

4.5 Are there any particular web-interface design concepts that impact on consumers' interactivity? For example, presentation style, imagery, logos, currencies supported, icons, graphical components, colours, language, flags, sounds, metaphors, etc.

As the Swiss market is linguistically segmented, the use of all official languages ensures that consumers across the country can fully enjoy their shopping experience. As mentioned above, the use of English is also common amongst Swiss-based e-commerce platforms. If consumers are targeted, the seller must display its prices in Swiss francs, including VAT. Moreover, NetComm Suisse, the Swiss e-commerce association, considers that customers pay close attention not only to prices but also to

quality, branding and reputation. Therefore, the leading Swiss e-commerce platforms often seek to make a strong impression in terms of product quality and forego the offering of lesser-known but cheaper brands in favour of brands with excellent reputation.

4.6 Has the COVID-19 pandemic had any lasting impact on these cultural norms?

The COVID-19 pandemic has not led to any cultural shift. This is likely due to the strong internet presence of Swiss consumers prior to the pandemic. 2020 and 2021 nonetheless proved positive years for e-commerce overall, with a strong increase in sales compared to 2019. Though not truly a shift from a cultural standpoint, the COVID-19 pandemic has comforted Swiss-based consumers that many of their needs can be met online, further cementing already strong pre-pandemic online shopping habits.

5 Brand Enforcement Online

5.1 What is the process for online brand enforcement in your jurisdiction?

A first step often involves reaching out directly to the e-commerce platform, as these typically have specific brand protection practices (such as take-down action) and respond swiftly. This process also has the advantage of speed, as recourse to the local courts is more time-consuming and costly. Various e-commerce platforms such as eBay and AliExpress, which both have a dedicated Swiss e-commerce platform, as well as Amazon, which currently addresses Swiss buyers via foreign (especially German) websites, have policies in place to combat brand infringement.

Alternatively, or consequently, to the above steps, brand holders can rely on a cease-and-desist and – if necessary – court injunction process against the known infringer. The legal basis for such actions is primarily trademark law but can also be founded on rights arising from unfair competition or company name regulations. This process may also be relevant in cases of domain name uses (for the “.ch” top-level domains) though in this context the WIPO’s domain name dispute resolution mechanism, set up by the WIPO’s mediation and arbitration centre, has enjoyed much success and allows the owners of trademarks, domain names or any other signs to resolve domain name complaints. In addition, domain name registrars are in practice cooperative to *prima facie* legitimate infringement claims and respond promptly to take-down and intervention requests.

5.2 Are there any restrictions that have an impact on online brand enforcement in your jurisdiction?

In practice, enforcement action against actors based outside of Switzerland may prove cumbersome. Moreover, Swiss law and case law is, by international comparison, still in quite early stages with respect to the notions of contributory infringement and vicarious liability of hosting providers, web access providers and platform operators, and there are arguably not many clear rules in that respect. The same goes for the use of someone else’s trademarks in Google Ads (formerly AdWords) or website metatags in particular, as there is little case law in this respect and the situation may therefore evolve; as things currently stand, the use of a protected term in Google Ads is generally permissible provided this use is not product-identifying; metatags are generally not problematic, though a case-by-case analysis is always necessary.

6 Data Centres and Cloud Location

6.1 What are the legal considerations and risks in your jurisdiction when contracting with third party-owned data centres or cloud providers?

By contracting with third party-owned data centres or cloud providers, organisations enter into a controller-processor set-up from a data protection perspective. Under the FDPA (see the above responses in section 2), outsourcing is generally permitted provided that (1) the processor processes such information only to the extent permitted to the controller, (2) no confidentiality obligations prohibit such outsourcing, and (3) the processor implements appropriate technical and organisational measures.

Compliance risks in this context primarily arise if data security (see the above responses in section 3) is implemented inappropriately or if personal data is transferred or disclosed abroad, in particular when recipients are located in countries outside the EU/EEA which do not provide an adequate data protection level.

The FPDIC, in its guidelines on cloud computing, recommends assessing any data security risk prior to engaging any subcontractor. For example, organisations should assess whether the specific cloud model is organised in a private or public cloud or whether the service includes infrastructure (IaaS), a platform (PaaS) or the provision of the software as a service package (SaaS). Further, organisations should in particular consider potential risks such as loss of control, service provider non-compliance (which can, however, only be assessed conclusively in advance with difficulty) and access by foreign authorities, which may be subject to a criminal offence.

Despite the above concerns, in practice, reputable cloud providers frequently provide for even higher data security standards than those in place within the outsourcing organisation’s own IT infrastructure.

Moreover, it is likely that outsourcing would include a transfer of data abroad. The FDPA requires that, unless an exception applies, any such transfer is based on additional safeguards if the recipient of the personal data is based in a country without legislation that guarantees adequate protection compared to the FDPA. Similar to the EU under the GDPR, such safeguards may be met by contractual agreements such as the EU Standard Contractual Clauses (adapted to Swiss circumstances). Additionally, in case of a transfer of personal data to a recipient based in a country without legislation that guarantees adequate protection compared to the FDPA, a so-called transfer impact assessment must be conducted in advance.

Further, compliance risks in relation to cloud services may be addressed sector specifically. For instance, the financial markets regulator, FINMA, has addressed specific risks in the financial and insurance sector in its circular on operational risks including outsourcing and data security aspects (see also the above response to question 2.3).

6.2 Are there any requirements in your jurisdiction for servers/data centres to be located in that jurisdiction?

There are no general requirements for data territoriality. Therefore, data storage outside of Switzerland is generally possible, though a company looking to store abroad may need to put certain safeguards in place prior to any cross-border transfer of personal data (see the above response to question 6.1).

7 Trade and Customs

7.1 What, if any, are the technologies being adopted by private enterprises and government border agencies to digitalise international (cross-border) trade in your jurisdiction?

In 2021, Switzerland ranked sixth in the IMD Business School's World Digital Competitiveness Ranking (the same as the previous year). Switzerland is praised for its ability to assimilate new technologies quickly and to exploit them to stimulate the digital transformation.

National initiatives such as "Digital Switzerland" (see the above answer to question 2.3), which bring together government bodies, companies, and interest groups, are aimed at building Switzerland's digital future at the international level.

Mandated by the Confederation, Switzerland Global Enterprise (S-GE) supports Swiss companies, especially SMEs, in their export and import activities. In 2017, S-GE started Export Digital in cooperation with Google, a digital market analysis tool that helps Swiss SMEs to start exporting or to boost their export strategies.

The Swiss authorities are prioritising the challenges of digital transformation, and major IT projects are currently under way to improve efficiency and performance in this area.

Presently, the Swiss tax authorities already offer electronic platforms enabling companies to process tax transactions online.

At the level of the Federal Tax Administration, this is particularly the case for customs duties and value-added tax (VAT) with platforms such as: TARES, which offers an online customs clearance procedure; CSP (customs account in the centralised settlement procedure of the Federal Customs Administration), which allows regular importers of commercial goods into Switzerland to carry out customs clearance without immediate cash payment, to request to receive tax rulings in electronic form and to receive invoices in electronic form rather than on paper; and ESTV SuisseTax (a government ePortal), which allows companies to process tax transactions online for VAT and also for other taxes such as withholding tax.

The introduction of the ePortal furthermore allows Swiss-based companies to access various eServices (automatic exchange of information, Country-by-Country Reporting, refund of anticipatory tax, beer tax declaration and refund, VAT declaration, contact form for citizens on tax-related questions, and a tax calculator, among others) on a unified portal.

7.2 What do you consider are the significant barriers to successful adoption of digital technologies for trade facilitation and how might these be addressed going forward?

The digitalisation of society and the economy is a challenge for political authorities, as it requires the adaptation of the legal and administrative frameworks.

To this end, the Federal Council regularly conducts surveys aiming at analysing the "numerical compatibility" of laws with an economic impact and the need to amend them.

On 1 August 2021, the remaining elements of the Federal Act on the Adaptation of Federal Law to Developments in Distributed Electronic Registry Technology entered into force, with the first tranche having entered into force on 1 February 2021. With this law, sometimes referred to as distributed ledger technology or "DLT" legislation, *ad hoc* adaptations of several federal acts affecting both civil law and financial market law will take place. The law aims to provide the best possible framework conditions so that Switzerland can establish and develop itself as a leading, innovative and sustainable location for fintech

and DLT companies. So far, this legislation is enjoying strong market approval as it strikes a good balance between clear regulation and sufficiently business-oriented leeway.

8 Tax Treatment for Digital Businesses

8.1 Please give a brief description of any tax incentives of particular relevance to digital businesses in your jurisdiction. These could include investment reliefs, research and development credits and/or beneficial tax rules relating to intellectual property.

On 1 January 2020, a corporate tax reform (TRAF) came into force in Switzerland. TRAF has induced significant changes in Swiss domestic law, amongst which are competitive corporate income tax rates in most Cantons (with ordinary overall rates varying between 11.9% and 21.6% depending on the location), as well as the introduction of a patent box regime and the possibility to use increased R&D deductions, both aiming at promoting research and development.

The patent box offers privileged taxation for income from qualifying patents and similar intellectual property rights on the part of R&D expenses that have been incurred in the country of residence in relation to total R&D expenses. The tax privilege consists of an exemption from cantonal tax that varies depending on the Canton but can reach up to 90% of the qualifying above-mentioned income.

With the additional deduction for R&D, taxpayers incurring R&D expenses in Switzerland, directly or indirectly through third parties, can deduct from their taxable income up to 150% of their actual R&D expenses. The additional 50% deduction is calculated on R&D personnel expenses – increased by 35% – and/or R&D expenses invoiced by third parties – up to 80%.

Furthermore, many Swiss Cantons offer tax incentives to newly established companies that create jobs and encourage business innovation (tax holidays or significant tax reliefs).

8.2 What areas or points of tax law do you think are most likely to lead to disputes between digital businesses and the tax authorities, either domestically or cross-border?

The main issue at stake in taxing the digital economy is balancing the allocation of tax revenues between the countries of residence of multinational companies and the markets where they are active. Current international allocation rules for corporate income tax purposes are indeed based on the physical presence of companies in a state (head office, related entities of the group or permanent establishments) and are outdated given the evolution of the digital business model. Countries where consumers (but not companies) are based thus see a share of the profits made on their territory escape taxation and may benefit from a very low global profit tax rate. Discussions at OECD and EU levels aim at enabling these "consumer-based" countries to tax part of the profits derived from their market, as well as to secure a global minimum taxation of the overall profits of multinational enterprises.

The new rules, which are to be finalised by mid-2022, will affect large multinationals and are divided into two pillars, both of which are subject to rather high thresholds in terms of annual turnover. In Switzerland, Pillar 1 is likely to affect a single-digit number of large companies, and Pillar 2 a low three-digit number. In this context, it is necessary to provide efficient tools to avoid double taxation, so as to avoid major disputes between digital companies and the various tax authorities. Switzerland supports the work of the OECD for the "Taxation of the Digital Economy" to achieve a well-functioning global system

of business taxation and ultimately ensure sustainable growth. In this respect, Switzerland favours a multilateral approach, based on consensus, rather than a multitude of uncoordinated national measures, and focuses on creating legal certainty for affected businesses. To that end, the Federal Council decided in January 2022 to implement, as of 1 January 2024 and subject to referendum, a minimum tax rate of 15% for certain companies defined by the key features agreed by the OECD and G20 member states. The incorporation of a minimum tax rate into Swiss law ensures that other countries cannot impose an additional tax on these specific undertaxed companies and spare such companies additional tax proceedings abroad. Switzerland will furthermore implement fiscal policy flexibility to counteract a possible loss of attractiveness as a business location.

As regards indirect taxation, Switzerland has not entered into any tax treaty for VAT purposes. Consequently, conflicts may arise when it comes to qualifying or localising a cross-border transaction for VAT purposes. Furthermore, a new subsidiary responsibility of digital sales platform operators will shortly be introduced for the payment of VAT due for deliveries in case the person who is deemed to be providing the service (the initial VAT taxpayer) fails to levy such VAT.

9 Employment Law Implications for an Agile Workforce

9.1 What legal and practical considerations should businesses take into account when deciding on the best way of resourcing work in your jurisdiction? In particular, please describe the advantages and disadvantages of the available employment status models.

Swiss employment law is generally considered liberal though it does contain rules protecting employees (such as termination notice periods, statutory social security contributions and overtime). That being said, the choice between an employment relationship rather than an independent contractor/self-employed contractor relationship essentially depends on how much control the employer wants to have over the contracted person (e.g. with respect to work organisation, business knowledge, etc.). In this context, if an employer wants close control over the contractor's activity, it will rather opt for an employment relationship bearing in mind the protective rights in favour of employees.

The distinction between an employment relationship and an independent contractor relationship under Swiss law may prove complex, it being noted that the formal designation of the relationship by the parties is irrelevant. The qualification of the relationship between the parties is therefore to be made on a case-by-case basis depending on all factual circumstances and in particular on the existence of any subordination (such as the obligation to comply with instructions, work organisation and time management). Depending on the relationship's qualification, the more protective employment law provisions may be applicable.

The qualification of the relationship between the parties remains irrelevant from a social insurance law perspective. Thus, an independent contractor/self-employed contractor may be qualified as dependent from a social insurance perspective, triggering the obligation to pay social security contributions.

9.2 Are there any specific regulations in place in your jurisdiction relating to carrying out work away from an organisation's physical premises?

Although remote work has been increasing in Switzerland over the last decade, it is far from being common practice outside

of the context of the COVID-19 pandemic. In this context, Swiss employment law does not provide for any specific rules with respect to remote work and the parties to an employment agreement remain free to discuss the conditions. However, even though Swiss law is silent with respect to remote work, all provisions remain applicable in particular with respect to time recording and health and safety regulations. Employers should have internal regulations and provide for specific terms in the employment agreement, such as coverage of equipment costs. Lastly, implementing and monitoring remote work remains mostly permissible, though the employer is generally prohibited from monitoring employee behaviour.

9.3 What long-term effects or changes are likely to result from the COVID-19 pandemic?

There is a general feeling that remote work, which has become commonplace during the COVID-19 pandemic, will remain a frequent practice going forward. Indeed, as the Swiss workforce includes a strong services sector, for whom remote work presents few hurdles, it is often expected that there will be a lasting effect from the pandemic on remote work habits.

10 Top 'Flags' for Doing Business as a Digital Business in Different Jurisdictions

10.1 What are the key legal barriers faced by a digital business operating in your jurisdiction?

Swiss-based businesses have in recent years had to ensure that their activities, from a data processing standpoint, were in line with the requirements of the EU GDPR (see the above answers in section 3). Indeed, though the GDPR is not directly applicable in Switzerland, many Swiss-based companies look to sell outside of Switzerland and logically target EU-based individuals, thus leading to the applicability of the GDPR. Though many actors have already taken the necessary steps, and awareness in this respect is high, there remains a sizeable amount of businesses that still need to adapt to the extent they wish to target EU/EEA-based individuals.

Moreover, Switzerland came in 36th position on the now defunct international "Ease of Doing Business Index", a World Bank ranking that provided an assessment of countries' regulatory landscapes in terms of creating and operating a business. This indicates that local businesses face various regulatory obstacles; however, the government has been taking steps toward a business-friendly national environment (see the below response to question 10.2).

Online businesses based outside of Switzerland but selling to Swiss-based buyers face the legal and practical barrier of customs clearance for goods entering Switzerland, which may make their offering less attractive to Swiss-based customers who bear any related customs clearance fees. Foreign businesses, to avoid this hurdle, need to register for VAT purposes with the Swiss tax authorities and charge Swiss VAT to their Swiss-based clients, which may be dissuasive due to the time and effort involved.

10.2 Are there any notable advantages for a digital business operating in your jurisdiction?

The Swiss government has, over the years, constantly looked to secure the position of local SMEs, which constitute 99% of all legal entities in Switzerland and are responsible for two-thirds of the jobs in the country (according to the Federal Statistics Office). Despite Switzerland not being first-in-class in the Ease

of Doing Business Index (see the above answer to question 10.1), SMEs, and businesses in general, therefore benefit from an environment that is suitable to their needs and favourable to their growth given the Swiss environment's political, economic, legal and judicial stability and reliability. As mentioned earlier (see the above response to question 1.2), consumer protection is not as developed in Switzerland as it may be in neighbouring jurisdictions. This does allow businesses to avoid having to implement consumer protection rights and measures, but on the other hand, it may have a negative impact on customer trust as these customers are increasingly getting accustomed to the consumer-oriented practices found abroad. For this reason, many businesses have already bolstered, on a voluntary basis, the contractual rights granted to their customers.

Lastly, as mentioned (in the above response to question 4.1), Swiss residents are particularly active online and therefore offer a thriving setting for digital businesses.

10.3 What are the key areas of focus by the regulator in your territory in respect of those operating digital business in your territory?

Currently, regulatory focus frequently pertains to the technological shift. In particular, matters of cybersecurity and data protection have received a lot of attention, as has the area of fintech in general. The various sectoral regulators or prudential bodies usually follow a rather hands-off approach. Indeed, interactions with regulatory bodies are usually easy and not laden with formal requirements.

11 Online Payments

11.1 What regulations, if any, apply to the online payment sector in your jurisdiction?

Payment systems, defined as systems to clear and settle claims for payment according to a unified set of rules, only require a licence (issued by the regulator, FINMA) if they are not operated by a bank and if their supervision is regarded as necessary for the functioning of the financial market or the protection of the market participants. Other online payment systems do not require a FINMA licence.

Under Swiss anti-money laundering (AML) regulations, the operation of an online payment system qualifies as financial intermediation subject to supervision and legal obligations. Swiss AML regulations only apply if the operator maintains a physical presence in Switzerland, meaning that it has a subsidiary, branch or office in Switzerland or otherwise engages persons in Switzerland on a commercial and continuous basis who represent the operator in connection with the payment process or advertising. According to FINMA's practice, physical presence is already given if a point of sale of an electronic means of payment or a customer service centre exists in Switzerland. Specific rules apply to means of payment, such as prepaid cards for which exemptions are available depending on certain thresholds.

Just like AML regulations, banking regulations apply to any activity which is not merely cross-border but involves the physical presence of a service provider. If, at any time during the payment process, money is accepted and stored (so-called "deposit-taking"), such receipt of funds from the public may be regarded as regulated banking activity and require a banking licence. Electronic means of payment which cannot load more than CHF 3,000, and pay no interest, are notably exempt.

If electronic means of payment (such as customer cards) provide a credit function, e.g. by allowing an overdraft, the Consumer Credit Act applies, which requires a licence to extend

interest-paying consumer loans and regulates the conditions for such loans. The Consumer Credit Act's scope of application extends to all loans offered to customers in Switzerland, which includes loans offered from abroad.

To date, Switzerland has not planned to implement a payment services regulation similar to the European framework of PSD II.

11.2 What are the key legal issues for online payment providers in your jurisdiction to consider?

A provider of an online payment system which may be regarded as necessary for the functioning of the financial market or the protection of the market participants must apply to FINMA for a licence (see the above response to question 11.1). However, this is not usually the case.

Furthermore, a provider of an online payment system or electronic means of payment with a physical presence in Switzerland (see the above response to question 11.1) is subject to the obligation to affiliate with a Swiss self-regulatory organisation (SRO) and to comply with Swiss AML rules, as well as the regulations of the SRO. Such obligations include, among other duties, the identification of the customers, assessment of certain transactions and reporting to the Money Laundering Reporting Office Switzerland in case of suspicion. The regulator has developed specific standards for online and video identification.

In case of a physical presence in Switzerland, the requirement for a potential banking licence, or its lighter form, the so-called "fintech licence", must be assessed if money is received from customers and stored.

If the online payment system or electronic means of payment involves a credit function, e.g. by allowing an overdraft, the extension of interest-paying loans to consumers located in Switzerland, even if provided cross-border, requires a consumer credit licence and is subject to the requirements for consumer credits.

12 Digital and the Green Economy

12.1 With the current global emphasis on the environment and sustainability, is there any current or anticipated legislation in that area which is likely to impact digital business in your jurisdiction?

Swiss legislation contains various acts aimed at protecting different facets of the environment, such as preventing water pollution, limiting the use of certain harmful products or contaminants, and so forth. More specifically, a new set of articles in the Swiss Code of Obligations (namely, Articles 964a *et seq.*) entered into force on 1 January 2022, addressing so-called "non-financial transparency questions". These provisions impose certain requirements on sizable corporations, in particular a duty to prepare an annual report that assesses, *inter alia*, environmental questions, such as CO₂ objectives, social questions, human rights matters and anti-corruption questions, as well as companies' impact on these subjects.

12.2 Are there any incentives for digital businesses to become "greener"?

Though there is significant and sustained political and democratic pressure, including on a federal level through the government's "2030 Agenda for Sustainable Development", Swiss laws do not yet include many dedicated "green" incentives.

12.3 What do you see as the environmental and sustainability challenges facing digital businesses?

One of the challenges is for digital businesses to demonstrate a clear and real commitment towards environmental and sustainability causes. Indeed, there is now increased scrutiny on all market actors, not only on those that may *prima facie* appear more

environmentally impactful than purely digital businesses. In addition, invoking environmental concerns as a marketing tool has, in recent months, backfired or proved counterproductive, eliciting claims of “greenwashing”.

Digital businesses therefore face a still relatively permissive legal landscape, which is however strewn with hurdles from a marketing and consumer-perception standpoint.



Jürg Schneider is a partner in Regulated Markets, Competition, Tech and IP team, co-heads the firm's Data Protection practice and is in charge of the Lausanne office. His practice areas include information technology, data protection and commercial contracts. He regularly advises both Swiss and international firms on comprehensive global projects and digitalisation activities. He has deep and extensive experience in the fields of data protection, information security, and e-commerce, with a particular focus on transborder and international contexts. In addition, Jürg Schneider regularly publishes and lectures on ICT topics and is a member of several professional organisations. He is an immediate past member of the board of directors of the International Technology Law Association and former co-chair of its data protection committee. Jürg is listed in *Chambers Europe*, *The Legal 500* and *Who's Who Legal TMT*.

Walder Wyss Ltd
Av. du Théâtre 1
1005 Lausanne
Switzerland

Tel: +41 58 658 80 00 / +41 58 658 55 71
Email: juerg.schneider@walderwyss.com
URL: www.walderwyss.com



Hugh Reeves is a managing associate in the Regulated Markets, Competition, Tech and IP team. He specialises in technology transactions, telecommunications, e-commerce, commercial contracts, as well as information technology and advises clients of all sizes on their deployment and commercial activities in Switzerland. Hugh is also active in the areas of data protection and intellectual property and regularly publishes in his areas of practice.

Walder Wyss Ltd
Av. du Théâtre 1
1005 Lausanne
Switzerland

Tel: +41 58 658 80 00 / +41 58 658 52 73
Email: hugh.reeves@walderwyss.com
URL: www.walderwyss.com



Emilia Rebetez is a managing associate within the firm's Tax team. She specialises in all aspects of domestic and international tax matters, regarding both individuals and corporate entities and is particularly active in the fields of financing, national and international reorganisations and implantation in Switzerland, cross-border relations, M&A and private equity transactions, as well as tax planning and wealth reorganisation. Emilia regularly represents her clients in the context of tax ruling negotiations or proceedings before the tax authorities and the courts. She further publishes and lectures on tax-related subjects, and is a member of the Geneva Bar Association, the Certified Tax Expert Association and the International Tax Association.

Walder Wyss Ltd
Rue d'Italie 10
1204 Geneva
Switzerland

Tel: +41 58 658 30 00 / +41 58 658 30 37
Email: emilia.rebetez@walderwyss.com
URL: www.walderwyss.com



Maria Gentile is a senior associate in the firm's Tax team. She specialises in all aspects of domestic and international tax matters, regarding both individuals and corporate entities and is particularly active in the field of value-added tax (VAT). Maria regularly represents her clients in proceedings before the tax authorities and the courts and advises, *inter alia*, on matters of tax planning and wealth reorganisation.

Walder Wyss Ltd
Rue d'Italie 10
1204 Geneva
Switzerland

Tel: +41 58 658 30 00 / +41 58 658 30 37
Email: maria.gentile@walderwyss.com
URL: www.walderwyss.com

Walder Wyss is one of the main actors in the Swiss legal services landscape with more than 240 lawyers. Its competencies include, in particular, providing advice on e-commerce, commercial contracts, intellectual property, data protection and all types of local or cross-border transactions. Our lawyers possess market-leading and peer-recognised knowledge in their respective practice areas. With offices across the country and experts in virtually all areas of the law, Walder Wyss offers its clients all the legal assistance they may require.

www.walderwyss.com

walderwyss attorneys at law

ICLG.com



Current titles in the ICLG series

Alternative Investment Funds	Franchise
Anti-Money Laundering	Gambling
Aviation Finance & Leasing	Insurance & Reinsurance
Aviation Law	International Arbitration
Business Crime	Investor-State Arbitration
Cartels & Leniency	Lending & Secured Finance
Class & Group Actions	Litigation & Dispute Resolution
Competition Litigation	Merger Control
Construction & Engineering Law	Mergers & Acquisitions
Consumer Protection	Mining Law
Copyright	Oil & Gas Regulation
Corporate Governance	Patents
Corporate Immigration	Pharmaceutical Advertising
Corporate Investigations	Private Client
Corporate Tax	Private Equity
Cybersecurity	Product Liability
Data Protection	Project Finance
Derivatives	Public Investment Funds
Designs	Public Procurement
Digital Business	Real Estate
Digital Health	Renewable Energy
Drug & Medical Device Litigation	Restructuring & Insolvency
Employment & Labour Law	Sanctions
Enforcement of Foreign Judgments	Securitisation
Environment & Climate Change Law	Shipping Law
Environmental, Social & Governance Law	Technology Sourcing
Family Law	Telecoms, Media & Internet
Fintech	Trade Marks
Foreign Direct Investment Regimes	Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by:

glg global legal group