

International Comparative Legal Guides



Practical cross-border insights into digital business law

Digital Business 2023

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1 E-Commerce Regulation

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 their 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 broad contractual freedom to the parties. This is particularly true in B2B relationships where, save for a few exceptions, the contracting businesses have significant 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.

Similar 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 to e-commerce businesses, both as regards B2B and B2C. The UCA also prohibits the use of abusive general terms and conditions that contain provisions

that go against the rules of good faith and create a disproportionate and unjustified disadvantage for the consumer. Notably, 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, defined as any person who purchases goods or services for purposes not related to his/her commercial or professional activity. Under the PIO, vendors must indicate the effective price, in Swiss francs, including value-added tax (VAT) and any other taxes or fees (such as copyright fees, waste disposal costs, etc.). Sellers must also state the unitary price for measurable goods (and detail price for any pre-wrapped goods), with some exceptions that apply when the 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 increasingly found in the general terms and conditions of Swiss-based e-commerce platforms active in the EU 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 place 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.

1.3 Please explain briefly how the UK Online Safety Bill, the EU's Digital Services Act and Digital Markets Act or equivalent local legislation may affect digital business in your jurisdiction.

The UK Online Safety Bill and, in particular, the EU's Digital Services Act (DSA) and Digital Markets Act (DMA) are expected to have a significant, indirect effect on Swiss digital businesses over time. Indeed, the DSA and DMA set a high minimum standard and go beyond the requirements imposed on digital businesses.

Because of the intrinsic cross-border nature of digital business, and because the EU is Switzerland's biggest trading partner, Swiss-based digital businesses, especially those of a certain size, will be looking to comply with those laws.

This is somewhat reminiscent of the efforts towards General Data Protection Regulation (GDPR) compliance for Swiss companies. Indeed, awareness among the Swiss business sectors of EU legislation is high and, again, reflects the important economic ties between the EU and Switzerland.

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 will enter into force on 1 September 2023. The revision aligns with the standards under the GDPR ensuring an adequate data protection level not only within Switzerland but from an EU perspective as well.

The text of the FDPA, applicable until 1 September 2023, 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; the revised FDPA expands the scope of the penalties and increases their amount to CHF 250,000, specifying that it is not the company that is liable to pay such penalties, but the actual person responsible for the breach of data protection legislation.

Lastly, considering the international environment of digitalisation, the revised FDPA – similar 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 that their data processing has an impact on the Swiss territory, namely when services are offered to Swiss-based customers or any related processing 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 often sensitive personal data. These businesses, even if relatively small in size, must therefore 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 and 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.

The government publishes and updates a 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. The focus themes for 2023 are digitalisation in the healthcare sector, digitalisation-friendly legislation and digital sovereignty.

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.

The Information Security Act of 18 December 2020 (ISA) should enter into force in the course of 2023 and will lead to

harmonised information security requirements for the federal government (i.e. not cantonal bodies, nor private sector actors).

More generally, 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. 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 on the legal level; this has so far comforted the legislator in not having to draft 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 abovementioned FDPIC. From September 2023 onwards, 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 towards 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. That said, the Swiss Commerce Trade Association noted that online consumption went down (slightly) in 2022. 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 the response 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 coming years. This is particularly true for certain categories of goods, such as foodstuffs, that 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, has taken measures to progressively, yet strongly, reduce the interchange fees (fees due to credit card issuers that 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. This is notably the case of the Commerce. swiss Trade Association's Swiss Online Garantie label used by its members. 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, which frequently use languages such as German, French, Italian and often English. Interestingly, although German, French and Italian are the official Swiss languages (a fourth official language being the regrettably 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 that do not speak German, French or Italian; and secondly, 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 among 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. Apart from offering reputable brands, Swiss e-commerce platforms (as well as brick and mortar stores) often rely on so-called “Swissness” elements (made in Switzerland) for distinctive purposes.

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 to be 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. However, it is specified that such platform resolution mechanisms do not necessarily allow the rights holder to bypass court action. 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 design rights, copyright and 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) although, in this context, the World Intellectual Property Organization’s (WIPO) domain name dispute resolution mechanism, set up by 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 are, 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 it currently stands, however, the use of a protected term in Google Ads is generally permissible provided this use is not product-identifying. Moreover, metatags are generally unproblematic, 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 FDPD (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 that do not provide an adequate data protection level.

The FDPIC, in its guidelines on cloud computing, recommends assessing any data security risks prior to engaging a 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 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 digital transformation.

National initiatives such as “Digital Switzerland” (see the above response 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 small and medium-sized enterprises (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 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. 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, among 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 research and development (R&D) deductions.

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 abovementioned 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. The Organisation for Economic Co-operation and Development (OECD) and the EU 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. These rules are divided into two pillars (Pillar 1 and Pillar 2), both of which are subject to rather high thresholds in terms of annual turnover. A consensus has been reached at the international level on Pillar 2. Pillar 2 aims at introducing a minimum taxation of 15% for internationally active groups of companies that reach the threshold of EUR 750 million in turnover.

In Switzerland, the Federal Council decided to implement the minimum tax rate agreed by the OECD and G20 member states by means of a constitutional amendment. Parliament agreed on the constitutional article on the OECD minimum tax in December 2022 and the Swiss electorate will vote on the bill in June 2023. In case of approval, a temporary ordinance will ensure that the minimum tax rate can come into force on 1 January 2024. The law will be enacted subsequently. Working groups are also now in place to ensure the implementation of the international rules at the Swiss level. 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. To this end, 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. 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 which 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?

In recent years, Swiss-based businesses have had to ensure that their activities, from a data processing standpoint, were in line with the requirements of the GDPR (see the above responses 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 number of businesses that still need to adapt to the extent that they wish to target EU/EEA-based individuals. This situation will, to a much smaller extent, repeat itself, given the entry into force on 1 September 2023 of revised Swiss data protection legislation; indeed, the new law will impose further requirements on companies, though compliance with the GDPR will greatly facilitate compliance with revised Swiss data protection legislation.

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 towards 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 response 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 in 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. This is because such customers are increasingly becoming 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 that 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 that 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 that 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 that 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 the impact of companies on these subjects.

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.

12.2 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.



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