

SWITZERLAND

Bär & Karrer



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Fintech outlook 2018

Switzerland has long established itself as an attractive base for cutting-edge technological innovators, notably in the financial sector and related areas. Among other factors, this development has been supported by the Swiss legal and regulatory landscape. Swiss financial regulation in particular is characteristically principle-based rather than rule-based, allowing it to cope well with new, original business models. Furthermore, the Swiss authorities are welcoming of innovation reinforcing Switzerland's position as a successful financial marketplace.

Given the principle-based approach, there are practically no Fintech-specific rules in Swiss financial market laws. The Swiss financial regulator, the Swiss Financial Market Supervisory Authority (FINMA), aims to apply the law in a technology-neutral manner, a concept that also translates into FINMA's generally applicable ordinances and circulars. While certain of FINMA's circulars do address aspects of technological implementations, they do so mainly to remove barriers and level the playing field between traditional actors and Fintechs. An example of this is the 2016 circular on video- and online-identification of counterparties for anti-money laundering purposes.

Addressing the rapid developments in the financial market, the Swiss Federal Council in 2016 proposed certain easements and other changes to Swiss regulatory requirements, primarily with the intention to foster an active and sustainable Fintech ecosystem, but in most cases applicable to any business fulfilling the relevant requirements. Some of the proposed new rules were already enacted in 2017, while some are presently still in the process of being turned into law.

Extended holding period of third-party monies and sandbox regime

With effect as of August 1 2017, the Swiss

Federal Council amended the Banking Ordinance to facilitate business models involving the holding of third party monies. This includes in particular crowdfunding and electronic payment processing services, but also traditional businesses with similar requirements. The rules allow for a broader scope of activities without triggering the requirement for a banking licence, the regulatory and financial burden of which would typically not be bearable for these businesses. Specifically,

- the maximum period for a business to hold third-party monies in interest-free settlement accounts without being seen as accepting (bank-type) deposits from the public was lengthened from seven to 60 days; and,
- a regulatory sandbox regime was created, allowing any business to accept, subject to certain limitations, client deposits in an amount of up to CHF1 million (\$1.04 million) without triggering a banking licence requirement.

Fintech licence and amendments to the Consumer Credit Act

As a step-up from the sandbox regime, the Swiss Federal Council proposed to introduce a new licence type below the standard of a fully-fledged banking licence, in particular to address the need of Fintech and other businesses to accept substantial third-party deposits without actually engaging in typical commercial banking. The creation of this new 'Fintech licence' (or banking licence 'light') will require an amendment of the Banking Act.

The planned new licence will allow licensed businesses to accept deposits from the public in amounts up to a total of CHF 100 million, with the option for FINMA to approve a higher ceiling on a case-by-case basis if the customers are protected by adequate safeguards. The regulatory requirements for obtaining and maintaining a Fintech licence, eg, organisational, capital and audit requirements, can be expected to be substantially reduced in comparison to a comprehensive banking licence. To account for the lower entry barrier, deposits may not be interest-bearing nor be invested. The holders of a Fintech licence have to inform their customers that the deposits are not covered by the Swiss depositor protection scheme.

Separately from the introduction of the Fintech licence, certain amendments to the Consumer Credit Act have been proposed with the aim of ensuring consumer protection in crowdlending situations. The general concept of the planned amendments is based on shifting certain duties that would in a regular consumer credit relationship fall on the bank or other professional lender to the intermediary, ie, the professional operator of a crowdlending platform. By contrast, in the prevailing situation, many of the safeguards of the Consumer Credit Act do not come to bear in the crowdlending space because non-professional lenders are typically exempt from the relevant duties and those of intermediaries are limited. With the planned amendments, the crowdlending intermediary will be required to review the credit standing of the consumer to determine his or her eligibility for a (crowdfunded) loan. Furthermore, the crowdlending intermediary will have to report loans granted to the consumer credit information office (and will also have access to the office's database for the purpose of its credit standing reviews).

The new regulations are part of a legislative package together with the proposed new Financial Services Act and Financial Institutions Act, which is still subject to further debate in the Swiss parliament. It is still expected that the bill will be finalised this year, but the new rules might not enter into force until early 2019.

Regulatory initiatives regarding blockchain and initial coin offerings

Despite remarkable technical and commercial developments in the recent past, the area of cryptocurrencies and blockchain-enabled business models in general has so far not been addressed by Fintech-related regulation projects in Switzerland.

In September 2017, against the background of growing public attention with respect to so-called initial coin offerings (ICO), FINMA published an initial guidance paper on the regulatory treatment of such alternative fund-raising schemes. While this FINMA Guidance 04/2017 does not attempt to qualify different types of ICOs, it summarises the existing core regulatory framework against which any ICO out of or into Switzerland is measured. In particular, FINMA references Swiss anti-

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money-laundering, banking and securities dealer regulation, the law on collective investment schemes, as well as the general corporate law prospectus requirements for debt and equity securities. Given the so far limited guidance, it has become good practice to present business models in the area of cryptocurrencies as well as ICO projects to FINMA for no-action confirmation. A more comprehensive statement by FINMA on its approach and practice in the area of ICOs is expected for the first half of 2018.

The existing procedure is that Swiss Federal Council examines whether further regulatory measures with regard to Fintech are necessary. In this context, the Federal Department of Finance (FDF) together with the State Secretariat for International Financial Matters and FINMA have been tasked to work on further defining the legal qualification of cryptocurrencies and regulatory requirements for ICOs.

To accelerate the process, the FDF launched a blockchain task force (in which also the law firm of the authors is represented) to identify the areas to be addressed in future legislative and regulatory projects. The task force will further debate risks and opportunities for Switzerland in this sector.

Separately, professional organisations representing the interests of the blockchain industry are driving self-regulatory initiatives. In particular, the Zug-based Crypto Valley Association recently presented a policy framework including a Code of Conduct for Decentralised Ecosystems outlining best practice guidance for ICOs by its members. In particular, the code emphasises transparency and the requirement to present the business model, token functionality and use of proceeds in a clear and comprehensible format.

The ultimate balance between principle-based and specific governmental regulation and self-regulation in this dynamic market remains to be seen. Given the traditionally restrained approach of Swiss financial regulation, it appears reasonable to expect a balanced mix with a focus on general principles set forth in financial market laws, combined with practical guidance by the regulator and industry self-regulation.

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