



**Fintech**

**2019**

**First Edition**

Editors:

**Barbara Stettner & Bill Satchell**

# Global Legal Insights

## Fintech

2019, First Edition

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**2019, FIRST EDITION**

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## PREFACE

Welcome to the first edition of *Global Legal Insights – Fintech*. In less than a generation, the financial system has gone from one based predominantly on paper cheques and manually balanced ledgers, to one where cheques are digital and ledgers are increasingly balanced through the ether using blockchain technology. Even the very idea of money is being redefined. Perhaps the only thing that is certain is that the financial markets of the future will not resemble the rapidly changing world we live in today.

News of new technologies in the financial markets, commonly known as “Fintech”, is constant. Potential breakthroughs range from the small – an improved system for processing payments – to the profound – news that global commodities markets are adopting smart contracts to trade and track shipments in real-time without the use of a traditional clearinghouse or intermediaries. It is a constant challenge for practitioners to keep pace with these developments.

Understanding the legal and regulatory implications of Fintech compounds the challenge faced by market participants in three significant ways.

- Fintech is borderless. New technologies naturally seek the broadest audience and application possible, which means operating across borders and in numerous jurisdictions, each with its own code of laws and customs that can be ignored only at great peril. Understanding and embracing Fintech means understanding and embracing a global mindset, difficult though that is in practice.
- Fintech is everywhere. New financial technologies sometimes come in a discrete, easy-to-identify package (e.g., Bitcoin), but more often they infiltrate and change well-established systems and processes in novel and unexpected ways. The line between old and new is rarely clear. This makes interpreting the legal and regulatory issues that arise from new applications of Fintech particularly challenging.
- Fintech is changing the rules. Even though most Fintech represents a combination of new ideas and existing markets, the result is fundamentally changing the way financial markets operate. Laws and regulations are struggling to catch up. While they do, new and potentially innovative products and services continue to be judged against old and often inappropriate standards, leading to delay, inefficiency, and frustration. The regulatory system is changing, but what replaces it come in the form of an entirely new system or a series of new rules and interpretations that allow the system to adapt incrementally?

By providing a comprehensive and systematic overview of the relevant laws and regulations across 26 key jurisdictions, paired with targeted chapters analysing important and timely subjects that should be of interest to practitioners, this publication is meant to offer critical perspective in an otherwise disorienting environment. New technologies will continue to emerge, and the tools available to regulators will continue to evolve in response. As that happens, resources like this are necessary to provide a fixed frame of reference from which to understand what is new, what is important, and how to respond.

We would like to thank all of the authors for their invaluable contributions and hope that this book will be a valuable resource.

Barbara Stettner and Bill Satchell,  
Allen & Overy LLP

# Switzerland

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## **Approaches and developments**

The market conditions in Switzerland for Fintech offerings are generally considered as favourable, in particular based on broad access to credit and venture capital, the available human know-how (number of graduates in science and technology), as well as the access to, and use of, information and communication technology. The Fintech market growth (value chain share) and expansion (range of products and services) have accelerated in Switzerland based on an already relatively high level. In 2018, the total amount of money invested in the Fintech industry rose sharply by 61.8%, compared to the previous year, to reach 75.7 million Swiss francs, with a high number of financing rounds raising over 3 million Swiss francs.<sup>1</sup> For the Fintech industry, the decisive considerations remain in financing and fundraising.

The Swiss Fintech landscape has evolved significantly over the past few years. Switzerland remains an attractive base for innovators in the financial sector. There are currently more than 200 active players (both emerging and incumbent) in Switzerland's Fintech ecosystem, whilst the total number of Fintech-related businesses is much higher. Most of their business models focus on the financial market sector (notably payment services, investment management, banking infrastructure, deposit and lending, distributed ledger technology (DLT) and analytics). A considerable number of these businesses offer their products and services to incumbent financial institutions and/or offer cooperation opportunities with respect to digitalisation projects.

Overall, the Fintech market in Switzerland is dominated by start-ups that are mainly financed through venture capital. A cooperation strategy between established providers of financial services and emerging players is common in Switzerland. While no general displacement trends can be identified at present, it is apparent that the value chain of established providers of financial services is under scrutiny and subject to (internal and/or external) challenges, including based on technology-driven new products and services developed by emerging companies that have the potential to disrupt the value chain of many established players. Established financial service providers generally have the financial and organisational resources required to adapt their business processes gradually to avoid such displacement and get high market visibility. Conversely, only a relatively small number of emerging companies can rely on a trust-emanating brand or a financial market licence (e.g., as a bank or a securities dealer).

Various associations and interest groups have been set up to coordinate the interests of Fintech-oriented organisations and individuals. They organise networking events, facilitate the exchange of experience and know-how and raise the voice of the Fintech sector in politics. In addition, the federally funded Commission for Technology and Innovation provides

financial and administrative support (subject to certain eligibility criteria). Furthermore, a considerable number of private initiative incubators and accelerators are active or have been recently launched to support emerging Fintech companies in the development of their business ideas and models. A number of Fintech-specific awards and challenges (e.g., Swiss Fintech Awards) are also intended to encourage innovation in the Fintech sector.

### **Fintech offering in Switzerland**

The most represented areas of Fintech include the following:

#### Robo-Advisors and high-frequency algorithmic trading

In Switzerland, financial advisors providing financial advice or investment management services online via automated or semi-automated systems, so-called “Robo-Advisors”, are growing in popularity. Several companies offer Robo-Advisor services aiming at allocating, managing and optimising clients’ assets based on mathematical rules or algorithms, which automatically determine the triggering and the individual parameters of an order (such as time, price or quantity). High-frequency trading is a subcase of algorithmic trading with very low delays in order generation and transmission, which usually pursues a very short-term trading strategy. Its distinctive feature is a high number of order entries, changes or deletions within microseconds.

#### Crowdlending

Crowdlending refers to alternative ways of raising capital from many participants using online platforms with or without professional intermediaries. Crowdlending is also known as peer-to-peer (P2P) or social lending because funding is provided by individuals or companies that are not financial institutions or intermediaries. Participants (funding providers) typically receive a payment in return for their funding made available to the project developer (borrower) in the form of interest, although participating loans or bonds/notes issuances are also possible. The amount of the interest or return payment varies depending on the risk of the project and borrower, but generally represents a lower cost of funding for the borrower than traditional bank lending. There are a number of crowdlending-based platforms in Switzerland which offer loans for both private persons and companies. Currently, the Swiss regulatory framework for financial activities does not contain any specific rules regarding crowdlending activities (see below under “Key regulations and regulatory approaches”).

#### Payment processors

In Switzerland, the payment services market has evolved during the last few years. Since the first market entry of a mobile payment app, the Swiss market has seen several new companies and a rapid consolidation process. Many electronic payment systems are at least partially based on classic credit or debit card payment schemes, using technology to facilitate payments at the point of sale, in the context of e-commerce, or in some cases between individuals (P2P). In addition to credit and debit card-based payments, some payment apps may be linked to traditional bank accounts with partnering banks. While the user experience is similar, the payment is in this case executed as a bank transfer. These systems are often bank-operated or bank-sponsored, and may therefore be less constrained in regulatory matters.

#### Distributed ledger technology

DLT, such as various blockchain implementations, have been the focus of many public and private initiatives. Whilst the Swiss legislature is aware that the possibilities offered by

DLT/blockchain go far beyond the application to such alternative financings, there is currently a legislative focus on the financial sector. The Swiss Federal Council published in December 2018 a report on the legal framework for blockchain and DLT in the financial sector. The report noted that the Swiss legal framework is well suited to deal with new technologies, although a few selective adjustments are expected to be implemented in the coming years. Furthermore, traditional fundraising techniques and processes have been challenged in the last couple of years by the emergence of a new form of capital raising by start-ups in the form of initial coin offerings (ICOs) or token-generating events based on DLT technology. In this context, the Swiss Financial Market Supervisory Authority (FINMA) published the “ICO Guidelines for enquiries regarding the regulatory framework for initial coin offerings” on 16 February 2018. Generally, FINMA focuses on the economic function and purpose of the tokens, as well as whether they are tradeable or transferable, in order to classify the tokens broadly into three “archetypes”, which are payment tokens (which include cryptocurrencies), utility tokens or asset tokens. The classification of the tokens has an impact on the applicable legal and regulatory framework (see below under “Key regulations and regulatory approaches”).

### **Regulatory and insurance technology**

The InsurTech market in Switzerland is growing rapidly, due to, for example, organisations pursuing business models which are based on the general challenges faced by incumbent insurance institutions (e.g., new regulatory frameworks, the inflow of alternative capital and the ongoing low interest rate environment). In general, incumbent insurance institutions have lower barriers when entering the InsurTech market, as they already have the corresponding licences and are able to focus on the development of the technology. To date, no legislation specifically refers to InsurTech business models. In this context, regulatory implications for specific InsurTech business models must be assessed under the ordinary principles governing the provision of insurance services, in particular as regards maintaining the protection objectives of insurance supervision by FINMA.

RegTech is a subset of Fintech focusing on technologies that may facilitate the delivery of regulatory requirements in a cost-effective and comprehensive way. RegTech refers to technology and software created to address regulatory requirements and help companies stay compliant, including by leveraging software and automation to close compliance gaps and to monitor and detect risks on a permanent basis. Outsourced functions by financial institutions (e.g., operational risk management and compliance tasks) is an important segment for RegTech companies. Again, to date, there is no legislation specifically referring to RegTech. FINMA has generally been welcoming technology applications supporting supervised entities in complying with regulatory requirements. Conversely, however, there are no material efforts led by the Swiss regulator to promote the development, use and reliance of technology for regulatory compliance, despite the fact that FINMA has adopted a number of initiatives to digitalise its own processes (e.g., electronic data reporting, only secure document filing and transmission platform, etc.).

### **Regulatory bodies**

In Switzerland, the legal framework governing the activities of Fintech operators consists of a number of federal acts and implementing ordinances issued by the Federal Council. The Swiss legal and regulatory framework does not foresee a single authority responsible for the overall supervision of Fintech companies. In this context, the following regulatory bodies and authorities may be involved depending upon the type of legislation concerned.

## FINMA

FINMA is Switzerland's regulator supervising the financial markets and its participants. The applicable licensing requirements or special approval processes, if any, depend on the business model of any given Fintech company. FINMA's regulatory powers derive from the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA). Generally speaking, FINMA is responsible for the authorisation, supervision, enforcement and documentation of all activities that require an approval. The supervision is risk-based depending upon the respective financial market participant. Financial market laws are enforced by FINMA, making use of administrative measures where necessary. FINMA is also competent to issue implementing ordinances as well as circulars and other guidance. As regards Fintech in particular, FINMA intends to strengthen Switzerland's position as one of the leaders in this sector. As a result, in 2016, FINMA put in place a specific Fintech desk to address this sector's issues more efficiently.

### Self-regulatory organisations (SROs)

Swiss Fintech companies that are financial intermediaries operating on a commercial basis are subject to the Swiss anti-money laundering framework, namely the Anti-Money Laundering Act (AMLA) (see below under "Key regulations and regulatory approaches"). Companies subject to AMLA that are not otherwise supervised by FINMA (e.g., a bank or securities dealer) must either hold a FINMA licence as a directly subordinated financial intermediary or become a member of a self-regulatory organisation (SRO) recognised by FINMA. While having limited enforcement powers, SROs are responsible for supervising compliance with the due diligence obligations of the financial intermediaries. In turn, FINMA actively supervises the SROs.

### Data Protection Commissioner

The Federal Data Protection and Information Commissioner (FDPIC) is the federal data protection authority in Switzerland. In addition, cantons are competent to establish their own data protection authorities for the supervision of data processing by cantonal and communal bodies. The FDPIC has no direct enforcement or sanctioning powers against private bodies processing personal data. Nevertheless, the FDPIC can carry out investigations on its own initiative or at the request of a third party (i) if methods of processing are capable of violating the privacy of a large number of persons (system errors), (ii) if a specific data collection must be registered, or (iii) if there is a duty to provide information in connection with a cross-border data transfer. To this effect, the FDPIC may request documents, make inquiries and attend data-processing demonstrations. On the basis of these investigations, the FDPIC may recommend that a certain method of data processing be changed or abandoned. Whilst these recommendations are not binding, if a recommendation made by the FDPIC is not complied with or is rejected, the FDPIC may refer the matter to the Federal Administrative Court for a decision. The draft of the revised Data Protection Act (DPA) foresees that the FDPIC will be able to issue binding administrative decisions (instead of recommendations under the current DPA); for example, to modify or terminate unlawful processing.

### Criminal authorities

In addition to FINMA, which is competent to issue administrative sanctions, criminal prosecution authorities are also involved in enforcing financial market laws. Where irregularities fall under criminal law, FINMA may file a complaint with the competent authorities (Federal Department of Finance, Office of the Attorney General and cantonal prosecutors). As an example, the exercise of an activity that requires a licence under the financial markets legislation without having obtained said licence is a criminal offence.

## Key regulations and regulatory approaches

Swiss law is generally technology-neutral and principle-based. Accordingly, Fintech companies based in Switzerland generally have considerable regulatory latitude compared to other jurisdictions. That being said, since 2015, the legislator's focus has been on adapting the applicable legal and regulatory framework to the needs of the Fintech sector. In this context, the Swiss legislator introduced three measures within Swiss banking legislation aiming at promoting innovation in the financial sector, i.e.:

- the introduction of a maximum period of 60 days (as opposed to seven days, in accordance with FINMA's prior practice) for the holding of monies on settlement accounts (e.g., for crowdfunding projects), without any limitation in terms of amounts;
- the creation of an innovation area called a "sandbox", where companies are allowed to accept public deposits up to a total amount of 1 million Swiss francs without the need to apply for a banking or fintech licence, subject to certain conditions such as disclosures and a prohibition to invest deposits; and
- the introduction of a new Fintech licence suitable for businesses whose activity involves some form of deposit-taking, but without any lending activities involving maturity transformation.

The first two measures of this so-called Fintech regime entered into force on 1 August 2017, whilst the Fintech licence entered into force on 1 January 2019, along with amendments to the Banking Ordinance adopted by the Swiss Federal Council on 30 November 2018.

Under the Fintech licence, financial services providers are allowed to accept public deposits provided that (i) the aggregate amount of deposits does not exceed 100 million Swiss francs, (ii) the deposits do not bear interest (or are not otherwise remunerated), and (iii) the deposits are not re-invested by the company (i.e., they are not used for on-lending purposes). This new Fintech licence involves less stringent regulatory requirements than a banking licence. Strict banking equity ratio requirements as well as the liquidity requirements do not apply. In addition, leaner minimal capital requirements apply. In this context, the minimum equity capital of companies benefitting from such a licence has to amount to 3% of the public funds (deposits) and must, in any case, reach a minimum of 300,000 Swiss francs. On 3 December 2018, FINMA issued guidelines for the Fintech licence, highlighting the information and documentation that an applicant must submit when applying for such licence. This namely includes a list of all participants holding a direct or indirect interest of 5% in the applicant, information on the governing bodies, as well as various explanations on the activities of the company with a business plan for three financial years. To be clear, the Fintech licence is not a banking licence, and companies operating under such a licence do not qualify as a banking institution and may not use such designation. In this context, the client deposits are not covered by the Swiss deposit protection regime and the clients must be comprehensively informed in advance of this fact, as well as of the risks resulting from the business model.

Alongside these specific Fintech-dedicated measures, the general applicable legal and regulatory framework applies to Fintech companies and may be summarised as follows:

### Banking and securities-dealing legislation

The solicitation and acceptance of deposits from the public on a professional basis is, as a matter of principle, an activity restricted to Swiss banks and triggers the obligation to obtain a fully-fledged banking licence from FINMA. Under the Banking Act, the term "deposit" broadly encompasses any liability owed to a client. Deposits are deemed to be "public" as soon as (i) funds are solicited from the "public" (as opposed to being solicited from banks or

professional financial intermediaries, institutional investors/shareholders, employees or other related persons), or as soon as (ii) funds from more than 20 depositors are accepted. As a result of this approach, most business models relied upon by payment systems, payment services providers, crowdfunding or crowdlending platforms, for instance, are considered to involve the solicitation and acceptance of deposits and may fall within the scope of the Banking Act and, therefore, trigger licensing requirements.

That being said, in the event that deposits of not more than 1 million Swiss francs (see above “Sandbox” exception with applicable conditions) are held by a Fintech company, no banking licence will be needed. Similarly, if the deposits are held for less than 60 days on a settlement account (without any limitation in terms of amounts), no banking licence will be needed. All other deposit-taking activities require either a Fintech licence for a deposit-taking activity not exceeding 100 million Swiss francs, or a fully-fledged banking licence. It is also worth noting that funds linked to means of payment or to a payment system are exempted from the qualification as deposits, provided that (i) the funds serve the purpose of purchasing goods or services, (ii) no interest is paid on them, and (iii) the funds remain below a threshold of 3,000 Swiss francs per customer *and* per issuer of a payment instrument or operator. Although this exemption may provide some relief to card payment services and online or mobile payment services, it requires a model strictly tailored in a way that any funds stored on user accounts be limited to the purchase of goods and services (as opposed to allowing peer-to-peer transfers, withdrawals, transfers to the user’s bank account, etc.) and never exceed 3,000 Swiss francs per customer.

Fintech companies may also fall under the scope of the Federal Stock Exchanges and Securities Trading Act (SESTA), as is generally the case for financial market infrastructures such as stock exchanges and multilateral trading systems. Companies buying or selling securities in a professional capacity on the secondary market, either for their own account with the intent of reselling them within a short time period, for the account of third parties, for making public offers of securities on the primary market, or offering derivatives to the public, also fall within the ambit of SESTA. In such case, a FINMA licence will be required.

#### Anti-money laundering legislation

Any Swiss-based natural or legal person accepting or holding deposit assets belonging to others, or assisting in the investment or transfer of such assets, qualifies as an intermediary according to AMLA. Namely, this includes persons carrying out credit transactions (in particular in relation to consumer loans or mortgages, factoring, commercial financing or financial leasing) or providing services related to payment transactions. This applies to many upcoming business models, such as those involving mobile payments, blockchain and related applications, cryptocurrencies, automated investment advice, crowdfunding or peer-to-peer lending. Based on this broad scope, many, if not most, Fintech companies qualify as financial intermediaries and are generally subject to anti-money laundering obligations, including compliance with know-your-customer (KYC) rules.

As mentioned, Fintech companies subject to AMLA are required to join a self-regulatory organisation or to obtain FINMA approval as directly supervised financial intermediaries (see above under “Regulatory bodies”). Compliance with Swiss anti-money laundering regulations is relatively straightforward and usually does not represent a significant entry barrier. However, dealing with the associated costs (which can be substantial and, hence, a key aspect with respect to certain business models) requires careful planning and possibly adaptation of envisioned business models. This applies, in particular, to Fintech companies providing alternative finance (e.g., crowdlending) platforms and payment services.

Similarly, compliance with AML/CFT requirements may be challenging for virtual currency payment products and services that rely on a set of decentralised cross-border virtual protocols and infrastructure elements. In this context, FINMA confirmed in its ICO Guidelines (see above under “Fintech offering in Switzerland”) that AML requirements may be fulfilled by having the funds accepted via a financial intermediary which is already subject to the AMLA in Switzerland, and which performs the corresponding due diligence requirements on behalf of the ICO organiser. In such circumstances, the ICO organiser does not itself have to be affiliated to an SRO or to be licensed directly by FINMA. Separately, FINMA also issued a circular on video and online identification (Circular 2016/7). Aimed at levelling the playing field and fostering technological developments, this circular provides for the possibility of financial intermediaries to comply with their KYC requirements by means of video transmission and other forms of online identification.

### Data protection

The processing of personal data by private persons and federal bodies is regulated in particular by the DPA and the Data Protection Ordinance (DPO), which apply, with some exceptions, to the processing of data relating to natural persons as well as (contrary to most other jurisdictions) legal entities. Personal data must be protected against unauthorised processing by appropriate technical and organisational measures. Such protection has been specified with respect to the storing, processing and transferring of client data in the banking sector (Annex 3 to FINMA Circular 2008/21 on capital adequacy requirements for operational risks within the banking sector). Of note, Swiss data protection law is currently being amended. While the technical requirements are likely to remain unchanged, there are considerable organisational and administrative requirements as well as significant sanctions foreseen. However, the particulars of the amendments and the timeline with respect to the entering into force of such amendments are not yet determined.

As regards cybersecurity, non-binding guidelines with respect to minimum security requirements for telecommunications services have been issued by the competent regulator, the Federal Office of Communications (OFCOM). However, there is no cross-sector cybersecurity legislation in Switzerland that would generally be applicable to Fintech companies.

As regards blockchain, although the data stored on a public blockchain is usually encrypted, personal data can still be generated by linking further information enabling it to be assigned to a natural person. If this is the case, the transparency and immutability of the information documented on the blockchain are not compatible with the basic principles of data protection. Participation in a blockchain platform would, to some extent, be tantamount to giving up informational self-determination (consent) as the data has been entered voluntarily into the system. While encryption technology and digital signatures fundamentally increase data security, effective protection against loss or theft also depends, to a large extent, on the management of private keys. For example, several of the major thefts of tokens can be traced back to the improper management of private keys. For this reason, great importance must be attached to the safekeeping of private keys.

### Other relevant legislation

Other legislation may apply to Fintech companies. As an example, under the Swiss Consumer Credit Act (CCA), only authorised lenders are entitled to provide consumer credits. Registration must be obtained from the lender’s Swiss Canton of establishment or, if the activity is conducted on a cross-border basis by a foreign lender, with the Swiss Canton in which the lender intends to perform its services. In the course of the amendment of the

Banking Act to introduce the new Fintech licence category (see above), the CCA has been amended. In this context, consumer loans that are obtained through a crowdlending platform will need to comply with the same consumer protection afforded by the law as if they were extended by a professional lender.

In addition, further licensing and supervisory requirements from the Swiss National Bank may be required for payment systems with payment settlement levels in excess of 25 billion Swiss francs (gross) per financial year, as well as for Swiss and foreign payment systems that are classified as “systemically relevant”.

### Outlook

On 22 March 2019, following the Swiss Federal Council’s report on the legal framework for blockchain/DLT in the financial sector (see above under “Fintech offering in Switzerland”), the Federal Council initiated a consultation process on the adaptation of federal law to developments in DLT. With this proposal, the Federal Council plans to increase legal certainty by removing hurdles for DLT-based applications and limiting risks of misuse. The consultation process will last until the end of June 2019. In a nutshell, the legislative amendments considered include (i) a civil law change aimed at increasing the legal certainty in the transfer of DLT-based assets, (ii) the possibility of segregation of crypto-based assets in the event of bankruptcy, and (iii) a new authorisation category for DLT trading facilities which is intended for services in the areas of trading, clearing, settlement and custody with DLT-based assets. Overall, these legislative amendments are expected to increase market access to Fintech companies in the field of DLT/blockchain technologies by improving legal certainty and removing certain regulatory barriers.

In addition, the new Swiss Financial Services Act (FinSA) and Swiss Financial Institutions Act (FinIA) are expected to enter into force on 1 January 2020. Whilst the purpose of the FinIA is to provide a new legal framework governing most financial institutions (i.e., portfolio managers, trustees, managers of collective assets, fund management companies and securities firms), the objective of the FinSA is to regulate financial services in Switzerland, whether provided by a Swiss-based business or on a cross-border basis in Switzerland or to clients in Switzerland. The rules are largely based on the EU directives (MiFID II, Prospectus Directive, PRIIPs), with adjustments made to reflect specific Swiss circumstances. In a nutshell, as regards Fintech, the new legal framework may involve additional regulatory requirements to the extent that Fintech companies provide financial services in Switzerland, or to Swiss clients (application of FinSA), or provide asset management services or other regulated services (application of FinIA and new licensing requirements) (see also under “Cross-border business” below as regards cross-border regulation).

Generally speaking, the Swiss regulatory framework is expected to remain in a state of flux for the years to come, with changes aiming at promoting innovation in the financial sector while increasing client protection.

### **Restrictions**

Based on its technology neutrality and principles-based approach, the Swiss regulatory framework allows for considerable regulatory latitude and room for development for Fintech companies. Two key principles of Swiss financial market regulation are system stability and consumer protection. Accordingly, a number of cross-sector regulations aim at strengthening the robustness of financial institutions while ensuring transparency. The specific Swiss Fintech regulation (see above under “Key regulations and regulatory

approaches”) maintains these principles while addressing the most critical barriers to innovative business models – i.e., the regulatory threshold for accepting client money and holding more than 20 deposits – and is tailored to allow fair and equal treatment of all market players while providing a risk-based framework to encourage innovation.

Traditional financial institutions encounter lower barriers when entering the Fintech market because such institutions are typically fully licensed and are, hence, in a position to develop and deploy technology-driven business models without the additional burden of ensuring that such development and deployment is in line with applicable general regulatory requirements. Several regulatory circulars and guidance papers, such as the FINMA Video and Online Identification Circular, FINMA ICO Guidelines and Swiss Federal Council’s report on the legal framework for blockchain/DLT in the financial sector are also aimed at lowering entry barriers for emerging companies by clarifying the regulatory framework applicable to Fintech companies. In this context, the current legal and regulatory framework generally allows new business opportunities for Fintech companies irrespective of the technology used, including by way of collaboration, outsourcing and otherwise.

In addition, it is worth noting that in the absence of international standards, FINMA, as well as other regulators across the world, generally adopt a cautious approach in relation to new technologies (e.g., capital adequacy requirements for cryptocurrencies). Such approach creates uncertainties for emerging Fintech companies as well as for existing financial institutions which are exposed to significant reputational risk.

### **Cross-border business**

Currently, Swiss financial services regulation places a strong emphasis on the principle of “home country” control, and takes a liberal stance as regards the promotion and provision of financial services in Switzerland by financial service providers incorporated outside of Switzerland. As mentioned, such regime will shortly be impacted by the forthcoming overhaul of the regulatory framework applicable to the provision of financial services. New legislation is expected to enter into force on 1 January 2020 and will provide, *inter alia*, that a non-Swiss financial services provider acting on a cross-border basis will be subject to Swiss rules of conduct, as well as, under certain circumstances, registration requirements in Switzerland for its client advisors. Client advisors of foreign-based financial services providers will be required to register in a Client Advisors Register in Switzerland prior to being able to offer financial services or products in Switzerland. In this context, the registration requirement will not apply at the level of the financial services provider, but at the level of the individuals qualifying as “client advisors” of such financial services provider. A blanket exemption may end up being eventually granted to certain foreign-regulated institutions by the Federal Council.

As regards anti-money laundering obligations, the Swiss regime (AMLA) only applies to financial intermediaries that have a “physical presence” in Switzerland and, as a rule, does not extend to foreign institutions active on a pure cross-border basis. As an example, payment service providers conducting their activity exclusively via electronic channels or the Internet, for instance, are typically not subject to AMLA. That being said, irrespective of the application of AMLA, the general prohibition of money laundering under criminal law remains applicable.

Finally, it is worth noting that FINMA engages with a number of international bodies to establish a framework aimed at promoting innovation, as well as the protection of customers and investors in this area. In this context, FINMA has entered into several memoranda of

understanding with various foreign regulators and regularly cooperates with foreign regulators or organisations. As an example, FINMA entered into a cooperation agreement with the Monetary Authority of Singapore in September 2016 aiming at encouraging and enabling innovation in their respective financial services industries. Overall, both FINMA and the Swiss legislator endeavour to support financial innovation and to establish a Fintech-friendly environment.

\* \* \*

### **Endnote**

1. Swiss Venture Capital Report 2018, available at: <https://www.startupticker.ch/en/home>.

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