Switzerland

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SWISS FINTECH REGULATION ON THE MOVE

INTRODUCTION

In various jurisdictions around the globe, new FinTech business models clash with traditional financial services regulations. FinTech firms face undifferentiated licence requirements that may be triggered by certain elements of their business model. For instance, a banking licence may be needed solely due to the fact that the FinTech business accepts funds from the public, even if it transfers such funds shortly thereafter to the ultimate recipient. As a consequence, capital adequacy and organisational requirements have to be met, which are onerous for smaller firms and make their market entry virtually impossible.

Fulfilling the high standards of a full banking licence is only adequate where the business model of the FinTech firm involves the same degree of risk as that of a bank. For instance, if a firm uses digital means to engage in the classic banking business with term transformation ("borrow short to lend long"), the same risk as with a traditional bank is present and the licence requirement should apply. However, if a business model does not include term transformation (such as a crowd-lending or a virtual currency platform), the level of risk is significantly smaller. Accordingly, it is inadequate to require a banking licence.

As the following section shows, the current Swiss regulatory framework does not take into account the principles of risk adequacy and proportionality with respect to FinTech companies and business models and sets unduly high barriers to the market entry for them. The Federal Council (ie, the Swiss federal government) identified the problem and proposed a set of amendments to the Banking Act aimed at a more risk-adequate and technology-neutral regulation.

STATUS QUO: LIMITED ROOM FOR FINTECHS

Financial services market entrants in Switzerland face anti-money-laundering (AML) regulation on the one hand and prudential regulation on the other. The AML regulation requires that a financial services provider either joins a self-regulating organisation or submits to direct supervision by the Swiss Financial Market Supervisory Authority FINMA. Although certain administrative processes have to be set up and a number of documents need to be filed, the AML regulation is a relatively small obstacle.

On the other hand, prudential regulation poses a larger regulatory hurdle. The Swiss Banking Act of 1934 (BankA) and the Banking Ordinance (BankO) essentially stipulate that public funds can only be accepted if the entity accepting these has a banking licence. While FINMA aims at being technology-neutral and attempts to accommodate requests from FinTech firms, the statutory requirements set out very limited exceptions. FINMA is bound to apply the banking licence requirement if certain formal conditions are met and they may not evaluate a business model based on the specific risks it may or may not pose. Accordingly, innovative business models that meet the condition of accepting public funds are subject to the banking licence requirement, even if they do not engage in term transformation as traditional banks do. In consequence, many FinTech companies would need a minimum share capital of CHF10m and have to meet extensive organisational requirements in accordance with the BankA, even though their business models do not pose the same risks as those of a traditional bank. For many young FinTech firms, the banking licence requirement would not be economically feasible.

An illustrative example is the recent Xapo case.[1] Xapo is a Bitcoin wallet provider that obtained permission to start operations as a financial intermediary without requiring a banking licence. However, this was only possible after a two-year discussion with the regulator and certain set-backs for Xapo. To get around the banking licence requirement, the crypto-currency service provider had to demonstrate to FINMA that it does not itself hold public funds and that its processes are insolvency-proof. Eventually, this was achieved. The Xapo case illustrates that the regulator is actively trying to use its scope of action in favour of FinTech on the one hand, but that FINMA's scope of action is limited by the traditional regulatory framework on the other.

PROPOSED FINTECH REGULATION

Recognising the difficulties of reconciling innovative business models with the existing licensing framework, the Swiss Federal Council has initiated amendments to the BankA and BankO in February 2017. In order to reduce the market entry barriers for FinTech companies in Switzerland and enhance the competitiveness of the Swiss financial market, the following three proposals are currently up for discussion:

- ***Increasing the time period for settlement purposes***: Crowdfunding platforms benefit from a very limited exemption in the current banking regulation. In order to settle the funding transaction, ie accepting the funds from the crowd and subsequently transferring them to the fund seeker, without a banking licence, the funds from the crowd must leave the platform operator's account within a maximum of seven days. Unlike big-scale funding transactions in the course of which banks collect and pool the funds within a short time period, it is very challenging for platform operators to draw down the funds from a crowd within such a short time. To alleviate this problem, the Federal Council suggests extending the settlement period from seven days to 60 days.
- ***Creation of a sandbox***: Similar to other countries like the UK or Singapore, the revised regulation shall allow for an innovation area in which companies with innovative financial business

models can commence their operations and conduct operations on a small scale without necessitating a banking licence. According to this proposal, a company will not require a banking licence for its operations as long as it only accepts public funds of no more than CHF1m. If the company is mainly active in the financial area, it must not generate an interest margin on the public deposits. The FinTech company would further be obliged to inform its clients proactively that it is not subject to prudential supervision and that the deposits do not benefit from the deposit guarantee scheme. Through the introduction of this sandbox, FinTech companies shall be enabled to test their business model before being required to obtain a banking licence. In any case, these companies would need to observe the respective AML regulations.

- ***Introduction of a "banking licence light":*** Finally, the Federal Council is considering the introduction of a simplified banking licence that shall enable FinTech companies to smoothly transition from the sandbox into the regulated and supervised sphere, but without imposing the full set of requirements applying to a fully licensed bank. Alleviations to the full banking licence requirements will be available to companies that, as a rule, accept public funds of up to CHF100m but do not operate in the lending business. Less stringent requirements are expected to lower the burden of the necessary minimum capital, own funds and liquidity. However, such companies would need to observe certain obligations relating to their accounting and the auditing of their financial statements by a supervised auditor. Furthermore, deposits from the public would continue to not benefit from the deposit guarantee scheme and companies will be obliged to inform their customers accordingly. The current proposal only outlines the envisaged reliefs; the details thereof are still to be specified in implementing ordinances.

Furthermore, FINMA would be granted a certain leeway when applying the less stringent requirements in order to account for the rapidly changing environment. In particular, in light of the blockchain technology and its evolving fields of application, FINMA will be allowed to grant the alleviations discussed above in justified individual cases if a business model requires the acceptance of more than CHF100m of public funds but does not conduct the lending business. In such a case, the company would also need to demonstrate how it ensures the protection of its customers by adequate (technical) measures.

Overall, the Federal Council has emphasised its willingness to offer both an attractive regulatory framework and legal certainty for the continuing digitisation of the financial sector. The Swiss regulators, including FINMA, have reconfirmed that they are actively monitoring the rapidly evolving developments, in particular relating to the blockchain technology, and their readiness to swiftly propose regulatory adjustments necessary to address the new developments.

FINAL REMARKS

The proposals reflect the traditionally liberal Swiss approach to regulation and the willingness of Swiss regulators to create an attractive environment for current and future market players, innovators and business models. The current suggestions have the potential to reduce some of the entry barriers and allow innovators to gradually enter the sphere of operating in a regulated environment. Nevertheless, the future attractiveness of the Swiss regulatory framework for FinTech providers will strongly depend on the exact implementation of these regulatory concepts and in particular the alleviations to the banking licence requirements.

In order to foster innovations and especially young companies, the Swiss legislature should also reconsider its taxation regime for start-ups. Currently, certain cantonal tax authorities apply aggressive valuation methods to the value of start-ups and charge its founders with high taxes, even though the equity is invested in the company and the company has not been generating sustainable profits yet.

A revision of this regime is another necessary measure to maintain and assert the competitiveness of the Swiss financial market.

The current proposals to the banking regulations have been up for discussion, and interested parties have provided their comments in the consultation process, by 8 May 2017. A revised proposal is expected later in 2017.

1 The authors were not involved in the *Xapo* case. The facts presented in this International Briefing are based solely on publically available sources.

Finland

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3D REAL ESTATE FINALLY INTRODUCED IN FINLAND

INTRODUCTION

Three dimensional (3D) real estate is a term commonly used to describe real property that is defined not only the traditional way by reference to coordinates on the ground level but also vertically, by reference to coordinates above and below ground, thus enabling layered property ownership. Despite the introduction of 3D property laws, eg in neighbouring countries like Sweden and Norway, and despite numerous initiatives taken in Finland over the past decade and aimed at the enactment of similar legislation also in Finland, Finnish property laws still do not recognise the concept.

Consequently, title to real property and other registered property interests (including, where applicable, buildings, fixtures and appurtenances to and on the same and extending as far vertically as the owner can reasonably be considered to be able to utilise the property to his or her financial benefit) is recognised only in its