Regulatory Framework regarding FinTech Companies (Disruptive Technologies)

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- **Regulation depending on the individual business model**
- **Virtual currencies**
- **Digital payment systems**
- **Crowdfunding**
- **Robo-advising**

1. Introduction

Currently, the Swiss regulatory regime contains no explicit provisions on financial technology ("FinTech") or FinTech-companies.

FinTech is usually associated with "disruptive" financial services provided by, or in collaboration with, nonbanking (licensed) IT-entities or start-up companies that specialize, amongst other things, in developing the underlying technology for virtual currencies (i.e., blockchain technology) or cost-efficient trading platforms, digital payment transactions, and personal finance applications. Notably, FinTech-companies offer financial services, such as exchanging and trading virtual currencies, crowdfunding, digital payment systems (mobile payment transactions), and digital wealth management (robo-advising).

These companies – and the disruptive financial services offered by FinTech-companies – may be subject to supervision or license requirements and approval by the Swiss Financial Market Supervisory Authority (FINMA). Depending on the individual business model of a FinTech-company, FINMA may decide whether the provision of the financial services falls under the scope of the following Swiss financial market laws:

- the Banking Act (BA);
- the Stock Exchange and Securities Dealers Act (SESTA);

- the Financial Market Infrastructure Act (FinfraG);
- the Collective Investment Schemes Act (CISA); and/or
- the Anti-Money Laundering Act (AMLA).

This article provides an overview on the relevant Swiss financial market regulation, regarding certain FinTech-business models, as outlined below.

2. Virtual Currencies

In Switzerland, virtual currencies, for example, the Bitcoin, are not legal tender despite their quasimonetary function; neither do virtual currencies qualify as investment products in the form of securities.

In principle, the mining process and the use of virtual currencies to acquire goods and services are not subject to the BA and the AMLA. These activities are not considered financial intermediation. Thus, companies accepting virtual currencies in exchange for goods or services are not required to obtain a FINMA license, as bank, securities dealer or directly subordinated financial intermediary (DSFI); neither do they need to become members of a recognized selfregulatory organization.

Likewise, the sale and purchase as well as the exchange of virtual currencies do not, in principle, fall under the BA's (and/or SESTA's) scope of applicability. If a trading platform operator , however, commercially holds cash accounts or virtual currency accounts for more than twenty (20) users, the operator may have to obtain a Swiss banking license, according to the BA.

Irrespective of the aforesaid, the sale and purchase of virtual currencies on a commercial basis by a platform operator are considered financial intermediation. This principle may also apply to the exchange of virtual currencies, despite the AMLA's unclear language. These activities, therefore, fall under the AMLA's scope of applicability. Consequently, FinTech-companies facilitating the sale and purchase as well as the exchange of virtual currencies (without a Swiss banking license) must either obtain a FINMA license, as a directly subordinated financial intermediary (DSFI) or become a member of a recognized self-regulatory organization.

3. Digital Payment Systems (Mobile Payment)

Digital payment systems facilitate payments for goods and services by means of using mobile phone apps or digital wallets.

Under the FinfraG, payment systems are facilities that clear and settle payment obligations, based on uniform rules. Digital payment systems to clear and settle payment obligations, denominated in fiat money (or virtual currencies), are considered payment systems, as defined in the FinfraG.

In principle, however, an operator of payment systems need not obtain a FINMA license. For example, digital payment systems operated by Swiss licensed banks are exempted from the license requirements. The same applies as long as payment systems lack the power to

(negatively) affect the financial market's functionality.

Furthermore, the operation of digital payment systems to facilitate the payment of goods and services is not subject to the BA. Such an operation may, however, require a Swiss banking license pursuant to the BA if, for example, the operator commercially holds, for more than twenty (20) users, cash accounts or virtual currency accounts exceeding the annual maximum amount of CHF 3,000 per user in order to clear and settle future payments.

Nevertheless, the operation of digital payment systems qualifies as financial intermediation and is thus subject to the AMLA, particularly to the amended provisions concerning the "development of new technologies" and the "new payment methods" in connection with the provisions on certain "spending limits." If, for example, the transactions are below a defined limit, e.g., CHF 5,000 per month or CHF 25,000 per year, then the operator (the financial intermediary) may be relieved from certain duties, pursuant to the implementing FINMA-Ordinance to the AMLA.

4. Crowdfunding

The term "crowdfunding" means the practice of financing a project or venture by raising many small amounts of money from multiple creditors (or investors) for debtors (or project developers; e.g., companies and individuals seeking risk capital) via an online platform.

Business operations of crowdfunding platforms are subject to the BA if the funds of more than twenty (20) creditors are, for a certain time period, deposited (or centrally pooled) with the platform operator. Thus, the platform operator is required to obtain a Swiss banking license from FINMA. In other words, it is understood that, if the creditors transfer the funds directly from their accounts to the debtors' accounts, the provider of the crowdfunding platform will not fall under the BA. Business operations of crowdfunding platforms are subject to the AMLA if the creditors’ funds are deposited (or centrally pooled) with the platform operator on a commercial basis. Thus, operators are required to obtain a FINMA license, as a directly subordinated financial intermediary (DSFI), or to become members of a recognized self-regulatory organization unless they are Swiss-licensed banks.

Finally, in case the debtor (or project developer) is a collective investment scheme and the business operations of the crowdfunding platform qualify as distribution, pursuant to the CISA, a provider may be required to obtain a FINMA license as distributor of collective investment schemes, according to the CISA.

5. Robo-Advising (Digital Wealth Management)

Generally, "robo-advising" (or digital wealth management) is associated with automated asset management by which the investor's assets are allocated by computers, based on mathematical algorithms.

In Switzerland, CISA and its implementing ordinances govern collective investment schemes as well as the management, distribution, and safekeeping of collective investment schemes. Thus, depending on the business model of a digital wealth management platform, the operator may be subject to the CISA and/or AMLA. For example, if the digital wealth management

platform business model qualifies as distribution, pursuant to the CISA, its operator must obtain a FINMA license as distributor of collective investment schemes, according to the CISA; as an independent asset manager, the operator would fall under the AMLA and its implementing ordinances, and the operator must either obtain a FINMA license, as a directly subordinated financial intermediary (DSFI), or become a member of a recognized self-regulatory organization.

Robert Furter

Senior Counsel
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 91 55
robert.furter@pestalozzilaw.com



Oliver Widmer

Partner
Attorney at law
Head Financial Services

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 42
oliver.widmer@pestalozzilaw.com

