



ICLG

The International Comparative Legal Guide to:

Fintech 2018

2nd Edition

A practical cross-border insight into Fintech law

Published by Global Legal Group, with contributions from:

A&L Goodbody
Advokatfirmaet BAHR AS
Anderson Mōri & Tomotsune
Anjarwalla & Khanna
Appleby
ATZ Law Chambers
Bär & Karrer Ltd.
BBA
BonelliErede
Bonn Steichen & Partners
Bredin Prat
De Brauw Blackstone Westbroek
ENSAfrica
Erciyas Law Office
Etah-Nan & Co, Attorneys

Evris Law Firm
Galicia Abogados, S.C.
Gilbert + Tobin
Gleiss Lutz
Goldfarb Seligman & Co.
Gorrißen Federspiel
GVZH Advocates
Haiwen & Partners
ISOLAS LLP
Kim & Chang
Lee and Li, Attorneys-at-Law
Mannheimer Swartling
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados
McMillan LLP
MinterEllisonRuddWatts

QUORUS GmbH
Rahayu and Partners Law Offices
in Association with HFW
Romulo
Roschier, Attorneys Ltd.
Shearman & Sterling LLP
Shearn Delamore & Co.
Shook Lin & Bok LLP
Slaughter and May
Trilegal
Udo Udoma & Belo-Osagie
Uría Menéndez
Uría Menéndez – Proença de Carvalho
Wilmer Cutler Pickering Hale and Dorr LLP
WKB Wierciński, Kwieciński, Baehr
Yale Law School



global legal group

Contributing Editors

Rob Sumroy and Ben Kingsley, Slaughter and May

Sales Director

Florian Osmani

Account Director

Oliver Smith

Sales Support Manager

Toni Hayward

Sub Editor

Jane Simmons

Senior Editors

Suzie Levy

Caroline Collingwood

CEO

Dror Levy

Group Consulting Editor

Alan Falach

Publisher

Rory Smith

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
May 2018

Copyright © 2018

Global Legal Group Ltd.

All rights reserved

No photocopying

ISBN 978-1-912509-08-9

ISSN 2399-9578

Strategic Partners



General Chapters:

1	Artificial Intelligence in Fintech – Rob Sumroy & Ben Kingsley, Slaughter and May	1
2	U.S. Regulation of Cryptocurrency as a Type of Financial Technology – Franca Harris Gutierrez & Sharon Cohen Levin, Wilmer Cutler Pickering Hale and Dorr LLP	7
3	Fintech and Private Equity: Blockchain Technology Use Cases – Jonathan Cardenas, Yale Law School	12

Country Question and Answer Chapters:

4	Australia	Gilbert + Tobin: Peter Reeves	16
5	Brazil	Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados; Renato Schermann Ximenes de Melo & Fabio Ferreira Kujawski	23
6	Cameroon	Etah-Nan & Co, Attorneys: Brice Tcheuffa & Hervé Feudjouo	28
7	Canada	McMillan LLP: Pat Forgione & Jeffrey Nagashima	33
8	China	Haiwen & Partners: Jinen Zhang & Xixiang Lin	39
9	Denmark	Gorissen Federspiel: Morten Nybom Bethe & Tue Goldschmieding	45
10	Finland	Roschier, Attorneys Ltd.: Niklas Östman & Sonja Heiskala	51
11	France	Bredin Prat: Bena Mara & Vincent Langenbach	57
12	Germany	Gleiss Lutz: Dr. Stefan Weidert & Dr. Martin Viciano Gofferje	63
13	Gibraltar	ISOLAS LLP: Joey Garcia & Jonathan Garcia	69
14	Hong Kong	Slaughter and May: Benita Yu & Jason Webber	75
15	Iceland	BBA: Baldvin Björn Haraldsson & Stefn Reykjalín	83
16	India	Trilegal: Kosturi Ghosh & Preethi Srinivas	89
17	Indonesia	Rahayu and Partners Law Offices in Association with HFW: Sri Hartati Rahayu & Indriana Pramesti	95
18	Ireland	A&L Goodbody: Claire Morrissey & Peter Walker	101
19	Isle of Man	Appleby: Claire Milne & Mark Emery	109
20	Israel	Goldfarb Seligman & Co.: Ariel Rosenberg & Sharon Gazit	115
21	Italy	BonelliErede: Federico Vezzani & Tommaso Faelli	121
22	Japan	Anderson Mōri & Tomotsune: Taro Awataguchi & Ken Kawai	127
23	Kenya	Anjarwalla & Khanna: Sonal Sejpal & Dominic Rebelo	133
24	Korea	Kim & Chang: Jung Min Lee & Samuel Yim	138
25	Luxembourg	Bonn Steichen & Partners: Pierre-Alexandre Degehet & Marie Casanova	144
26	Malaysia	Shearn Delamore & Co.: Christina Kow & Timothy Siaw	149
27	Malta	GVZH Advocates: Dr. Andrew J. Zammit & Dr. Kurt Hyzler	156
28	Mexico	Galicia Abogados, S.C.: Mariana Islas & Claudio Kure	161
29	Netherlands	De Brauw Blackstone Westbroek: Richard van Staden ten Brink & Björn Schep	166
30	New Zealand	MinterEllisonRuddWatts: Jeremy Muir & Lloyd Kavanagh	173
31	Nigeria	Udo Udoma & Belo-Osagie: Yinka Edu & Tolulope Osindero	179
32	Norway	Advokatfirmaet BAHR AS: Markus Nilssen & Sondre Graasvoll	185
33	Philippines	Romulo: Claudia Squillantini & Agustin Montilla	191
34	Poland	WKB Wierciński, Kwieciński, Baehr: Marcin Smolarek & Agnieszka Wiercińska-Krużewska	196

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.

Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.

This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

35	Portugal	Uría Menéndez – Proença de Carvalho: Pedro Ferreira Malaquias & Helder Frias	203
36	Russia	QUORUS GmbH: Maxim Mezentsev & Nikita Iovenko	211
37	Singapore	Shook Lin & Bok LLP: Andrea Chee & Agnes Lim	219
38	South Africa	ENSafrica: Prof. Angela Itzikowitz & Era Gunning	227
39	Spain	Uría Menéndez: Leticia López-Lapuente & Livia Solans	233
40	Sweden	Mannheimer Swartling: Martin Pekkari & Anders Bergsten	241
41	Switzerland	Bär & Karrer Ltd.: Dr. Daniel Flühmann & Dr. Peter Hsu	247
42	Taiwan	Lee and Li, Attorneys-at-Law: Robin Chang & Benjamin K. J. Li	254
43	Tanzania	ATZ Law Chambers: Shamiza Ratansi & Aggrey Ernest	260
44	Turkey	Erciyas Law Office: Nihat Erciyas & Miraç Arda Erciyas	265
45	Ukraine	Evris Law Firm: Sergii Papernyk	270
46	United Kingdom	Slaughter and May: Rob Sumroy & Ben Kingsley	275
47	USA	Shearman & Sterling LLP: Reena Agrawal Sahni	282

EDITORIAL

Welcome to the second edition of *The International Comparative Legal Guide to: Fintech*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of fintech.

It is divided into two main sections:

Three general chapters. These chapters provide an overview of artificial intelligence in fintech, the regulation of cryptocurrency as a type of financial technology, and fintech and private equity.

Country question and answer chapters. These provide a broad overview of common issues in fintech laws and regulations in 44 jurisdictions.

All chapters are written by leading fintech lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Rob Sumroy and Ben Kingsley of Slaughter and May for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.

Group Consulting Editor

Global Legal Group

Alan.Falach@glgroup.co.uk

Switzerland

Bär & Karrer Ltd.

Dr. Daniel Flühmann



Dr. Peter Hsu



1 The Fintech Landscape

- 1.1 Please describe the types of fintech businesses that are active in your jurisdiction and any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications).**

The Swiss fintech landscape has evolved significantly over the past few years and Switzerland continues to be an attractive base for innovators in the financial sector. Approximately 200 active companies in various sub-sectors form the core of the diverse Swiss fintech ecosystem. The total number of fintech-related businesses, however, is much higher. Many established financial institutions and other established financial market players have entered the fintech space in the recent past and, as a result, the distinction between fintech and traditional financial services has become increasingly blurred.

Swiss-based fintech businesses include robo-advisory and social trading services, crowdfunding and crowdlending platforms as well as payment systems and businesses active in the area of collective investment schemes. One of the key focus areas in the past year has been driven by blockchain-based businesses, in particular in the areas of cryptocurrencies and decentralised transaction platforms (e.g. Ethereum and Lykke), many of which are based in the so-called “cryptovalley” in the Canton of Zug. This development is accompanied by a notable increase in so-called initial coin offerings (“ICO”) out of Switzerland, i.e. a digital method of raising capital through the issuance of tradable digital units (coins or tokens) to finance or develop early stage projects of start-ups, including but not limited to projects in the fintech sector.

The Swiss fintech industry has formed a number of associations and shared interest groups (e.g. the Swiss Finance + Technology Association, Swiss Fintech Innovation, Swiss Finance Startups and the Crypto Valley Association) to promote, together with investors, experts and media, the development of a strong Swiss fintech sector.

- 1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?**

Switzerland has no specific prohibitions or restrictions in place with respect to fintech. Generally speaking, Swiss financial regulation is technology-neutral and principle-based, which has so far allowed it

to cope with technological innovation. That said, fintech operators may be subject to regulation and supervision by the Swiss Financial Market Supervisory Authority FINMA (“FINMA”) or by self-regulatory organisations depending on the nature and specifics of their business. The relevance and application of Swiss laws on e.g. anti-money laundering, collective investment schemes, financial market infrastructures, banks, insurance companies and/or securities dealers has to be assessed in the individual case (see question 3.1). With regard to ICOs in particular, FINMA recently published a guidance letter in which it emphasised the concept of an individual review of each business case regarding the regulatory impact. It is therefore prudent for fintech start-ups to seek clearance from the regulator before launching their project in the market.

2 Funding For Fintech

- 2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?**

Switzerland has an active start-up scene and various funding opportunities are available for companies at every stage of development. There are seed and venture capital firms for early funding as well as mature debt and equity capital markets for successful companies at a later stage. In addition, there are many financial institutions that have a potential interest in buying an equity stake in fintech companies or in a full integration.

Crowdfunding and crowdlending as alternative sources of funding have shown rapid growth rates in Switzerland. The first crowdfunding platform was founded in 2008 and currently there are now around 50 active platforms (compared to only four in 2014). A further professionalisation of the crowdlending market may be expected for the near future as Swiss Parliament is deliberating on changes to the Consumer Credit Act (“CCA”) with the intention to subject crowdlending intermediaries to certain reporting duties and further obligations in connection with the review of the creditworthiness of the borrowers.

Furthermore, a growing number of incubators and accelerators, either exclusively fintech-related (such as the association F10 or Thomson Reuters Labs – The Incubator) or focused on digital innovation in general including fintech (such as Kickstart Accelerator), support and guide fintech start-ups in transforming their ideas into successful ventures.

2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?

There are no specific tax or other incentives for the benefit of the fintech industry in Switzerland. However, depending on the tax domicile of the company and the residence of the shareholders, there are certain tax benefits for start-up companies and tax schemes benefitting investors. In addition, again, depending on the tax domicile of the company, the ordinary profit tax rate in Switzerland can be as low as 12%. Currently, there are also discussions in Switzerland regarding the introduction of special R&D deduction regimes and of an IP box regime.

In particular, start-ups may benefit from a tax holiday on the cantonal and federal level if their tax domicile is located in a structurally less developed region of Switzerland. Furthermore, if a company sells a stake of at least 10% in an investment which has been held for at least one year prior to the sale of the participation, the realised profit benefits from a participation deduction. In addition, Swiss resident individuals are not taxed on capital gains realised on privately held assets. Dividend payments to companies which hold a participation of at least 10% or with a fair market value of at least CHF 1 million in the dividend paying company also benefit from the participation deduction. Dividend payments to Swiss resident individuals on substantial participations of at least 10% are taxed at a reduced rate.

Switzerland levies annual wealth taxes. In order to lessen the tax burden for start-up investors, start-up companies are often valued at their substance value for wealth tax purposes (e.g. in the Canton of Zurich).

Finally, it is common in Switzerland to discuss the tax consequences of an envisioned structure with the competent tax administration.

2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

The requirements for a listing on the SIX Swiss Exchange (the main Swiss stock exchange) are laid down in its Listing Rules and its Additional Rules and can be divided into (i) requirements regarding the issuer, and (ii) requirements regarding the securities to be listed. Essential criteria include e.g. that the issuer has existed as a company for at least three years, has a reported equity capital of at least CHF 2.5 million, a free float of at least 20% and a minimum capitalisation of the securities in public ownership of CHF 25 million.

2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

There have not been any recent IPOs in Switzerland in the area of fintech. However, in 2017, Warburg Pincus acquired 45% of the shares in Avaloq Group AG, a leading Swiss provider of software solutions and business process outsourcing services for the financial industry.

3 Fintech Regulation

3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

The Swiss financial regulatory regime does not specifically address

fintech. Rather, the legal framework governing the activities of fintech operators consists of a number of federal acts and implementing ordinances as well as circulars and other guidance issued by FINMA. Fintech business models have to be assessed in light of this regulatory framework on a case-by-case basis (see question 1.2).

Based on their (intended) activities, fintech operators may in particular fall within the scope of the Banking Act (“BA”) (if engaging in activities involving the acceptance of deposits from the public; see question 3.2), the Anti-Money Laundering Act (“AMLA”) (if active as a so-called financial intermediary, e.g. in connection with payments or lending; see question 4.5), the Collective Investment Schemes Act (if issuing or managing investment funds or engaging in other activities relating to collective investment schemes), the Financial Market Infrastructure Act (if acting as a financial market infrastructure, e.g. a multilateral trading facility), the Stock Exchange Act (if acting as a securities broker-dealer or as a proprietary trader), or the Insurance Supervision Act (if acting as an insurer or insurance intermediary). Moreover, *inter alia*, the CCA, the Data Protection Act (“DPA”) as well as the National Bank Act may apply.

Depending on the specific business model, regulatory requirements may include licence or registration requirements as well as ongoing compliance and reporting obligations, in particular relating to organisation, capital adequacy, liquidity and documentation, as well as general fit-and-proper requirements for key individuals, shareholders and the business as such. Certain types of regulated businesses are prudentially supervised by FINMA on an ongoing basis in a two-tier approach whereby a regulatory audit firm appointed by the supervised firm conducts a significant part of the on-site reviews. The individual financial market laws provide for *de minimis* and other exemptions that can potentially be relevant for fintech operators depending on the type and scale of their activities.

FINMA is the unified supervisory authority for the Swiss financial market, ensuring a consistent approach to the qualification and regulatory treatment of fintech operators. Furthermore, Switzerland has an established system of industry self-regulation by private organisations such as the Swiss Bankers Association SBA, the Swiss Funds & Asset Management Association SFAMA as well as numerous professional organisations for financial intermediaries. Some of the regulations issued by self-regulatory organisations have been recognised by FINMA as minimum standards (e.g. in the area of money laundering prevention).

3.2 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested?

Representatives of FINMA have expressed on various occasions that the Swiss regulator encourages innovation in the Swiss financial marketplace. FINMA has, *inter alia*, established a dedicated fintech desk to interact with fintech start-ups and held a roundtable focusing on blockchain technology with interested parties in May 2017. Furthermore, FINMA’s CEO in particular supports legislative change to lower market entry barriers for innovative financial services providers and to establish Switzerland as a fintech hub. In the recent past, FINMA revised several of its circulars, which specify the practice of the regulator under the current legislation, to render them technology-neutral (e.g. by not requiring certain documentation to be held in physical written form). FINMA also published new circulars with the purpose of removing obstacles for technology-oriented financial services providers, notably a circular enabling video and online customer identification for anti-money laundering purposes (see question 4.5).

To further the efforts of the financial regulator for facilitating fintech, projects for legislative changes at various levels were initiated in late 2016. Certain elements of these projects were already implemented in 2017. In particular, the Swiss Federal Council (*i.e.* the Swiss federal government) amended the Swiss Banking Ordinance (“BO”) with effect as of 1 August 2017, introducing the following reliefs with regard to licensing requirements:

- **Innovation sandbox:** Firms accepting deposits from the public or publicly holding themselves out as accepting deposits may profit from an exemption from the requirement to obtain a banking licence as long as the deposits accepted do not exceed CHF 1 million. This threshold is measured on the basis of the aggregate deposits held at any given point in time. The exemption is available to fintechs as well as any other type of business. However, operators that are mainly active in the financial sector are only allowed to benefit from the exemption if no interest is paid on the deposits and the funds are not invested. A business making use of the sandbox exemption is required to inform its customers that it is not supervised by FINMA and that deposits are not covered under the Swiss depositor protection scheme. The sandbox introduced with the amended BO allows fintech innovators (and other businesses) to develop and test their business idea without incurring the burden of requiring a banking licence or having to comply with prudential supervision requirements at an early stage of development.
- **Extension of the maximum holding period of third-party monies on settlement accounts:** With the amended BO, third-party monies accepted on interest-free accounts for the purpose of settlement of customer transactions do not qualify as deposits from the public (and therefore do not count towards a potential banking licence requirement) if the monies are held for a maximum of 60 days (instead of only seven days, as was the case before 1 August 2017). Crowdfunding platforms in particular, but *e.g.* also payment service providers, the business model of which typically requires holding third-party funds for a certain period of time, benefit from this broadened exemption. It should be noted that settlement accounts of foreign exchange dealers generally do not fall within the scope of the exception for settlement accounts. In the context of fintech, this may in particular affect cryptocurrency traders, which are subject to the same limitation if their business is conducted in a manner comparable to a traditional foreign exchange dealer.

Irrespective of the reliefs granted by the amended BO, anti-money laundering regulation continues to apply to fintech firms if they qualify as financial intermediaries (*see* question 4.5).

In addition to the changes to the BO, Swiss Parliament is currently preparing changes to the BA with the aim to introduce a new regulatory licence category below the fully fledged banking licence, *i.e.* a licence geared towards financial innovators (sometimes referred to as banking licence “light”). This project is being discussed in Swiss Parliament in the context of the deliberations on the planned Financial Services Act (“FinSA”) and Financial Institutions Act (“FinIA”). The new licence category is intended to be available to fintech firms, but also other entities that accept public deposits but do not engage in commercial banking. Holders of the licence will be able to accept public deposits up to a total value of CHF 100 million, but will not be allowed to invest the deposits or pay interest on them. A higher threshold in excess of CHF 100 million can be approved by FINMA on a case-by-case basis if customers are protected through additional safeguards. The regulatory requirements for obtaining and maintaining the licence will be significantly reduced versus a fully-fledged banking licence. *Inter alia*, less demanding standards are expected to apply regarding financial reporting and audits as well as organisational, equity, capital adequacy and liquidity requirements. Deposits accepted under a banking licence “light” will not be covered by the Swiss depositor protection scheme, a fact

that licence holders have to inform their customers about. As the National Council (the large chamber of Swiss Parliament) proposed a number of changes to the current drafts of the FinSA and FinIA, the Council of States (the small chamber of Swiss Parliament) will deliberate on the revised drafts (including the relevant provisions in the BA) again in its 2018 spring session. The reconciliation of differences between the National Council and the Council of States may be expected to take place in summer 2018 at the earliest.

The Swiss Federal Council is furthermore in the process of examining whether further regulatory measures with regard to fintech are necessary. In this context, the Federal Department of Finance together with the State Secretariat for International Financial Matters and FINMA work on a legal solution regarding the qualification of virtual currencies and regulatory requirements for ICOs. Moreover, the Swiss Federal Council has initiated roundtables with representatives of the financial sector and FINMA.

3.3 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?

The Swiss inbound cross-border regulatory regime for financial services is relatively liberal. Many Swiss financial market regulatory laws do not apply to fintech (and other) businesses that are domiciled abroad and serve customers in Switzerland on a pure cross-border basis, *i.e.* without employing persons permanently on the ground in Switzerland (including by frequent travel). Notably, the BA and the AMLA apply only to foreign operators that have established a relevant physical presence in Switzerland, *e.g.* a branch or representative office. That said, cross-border operators that are not regulated in Switzerland should refrain from creating an (inaccurate) appearance of “Swissness”, *e.g.* by using a “.ch” website or referring to Swiss contact numbers or addresses.

It should be noted that some areas of Swiss financial regulation are more restrictive with regard to cross-border activities, notably the regulation of collective investment schemes as well as insurance regulation.

Furthermore, as Switzerland is not a member of the EU nor of the EEA, no passporting regime is available.

4 Other Regulatory Regimes / Non-Financial Regulation

4.1 Does your jurisdiction regulate the collection/use/ transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?

Swiss data protection law is set forth in the DPA and the implementing Data Protection Ordinance (“DPO”). Swiss data protection law is influenced significantly by EU law, both in terms of content and interpretation.

Fintech firms are subject to the DPA if they process personal data in Switzerland. In this context, the mere storage of personal data on a server in Switzerland is sufficient. Deviating from most foreign data protection laws, the DPA also treats information referring to legal entities as personal data. It is worth mentioning that Swiss data protection law is based on an “opt out” model, meaning that the processing of personal data is not allowed against the express

wish of a data subject, but the consent of a data subject is not a requirement for lawful processing (subject to specific rules regarding the processing of particularly sensitive personal data).

A fintech firm processing personal data in Switzerland must do so in accordance with the following data processing principles: good faith, proportionality, purpose limitation, transparency, accuracy, data security, and lawfulness. Furthermore, an obligation to register a data file with the Swiss Data Protection Commissioner (“**Commissioner**”), prior to any data processing, applies if the controller of a data file regularly processes so-called sensitive personal data (e.g. health data or trade union related views and activities) or personality profiles (i.e. a collection of data that permits an assessment of essential characteristics of the personality of an individual), or regularly discloses personal data to third parties (including affiliates). The Commissioner maintains an online register of such data files (www.dataereg.admin.ch). The registration is free of charge.

Swiss data protection law is currently under revision. The revised DPA is, however, not expected to enter into force before January 2019.

4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?

The processing of personal data on equipment located in Switzerland is, in principle, in the scope of the DPA (see question 4.1). This is particularly relevant for foreign fintech firms that are processing personal data in Switzerland through branch offices or third-party service providers.

The DPA prohibits a disclosure (transfer) of personal data abroad if such a transfer could seriously endanger the personality rights of the data subjects concerned. This might be the case particularly if personal data is intended to be disclosed to a country where the local legislation does not guarantee an adequate protection of personal data. The Commissioner has published a (non-binding) list of countries that provide an adequate level of data protection. In particular, all EU Member States are deemed countries with adequate data protection rules. The main means to secure adequate protection for transfers to other countries is the use of model contracts for the transfer of personal data to third countries issued by the European Commission (EU Model Clauses), adapted to Swiss law requirements, or other contractual clauses explicitly recognised by the Commissioner. Another option is to obtain consent for the transfer from the data subject whose data is being transferred.

4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.

The sanctions pursuant to the current DPA are moderate:

- **Civil law sanctions:** A data subject can file a request for an interim injunction against unlawful data processing. It is also possible to lodge a claim for the correction or deletion of data or a prohibition on the disclosure of data to third parties. In addition, a data subject is entitled to compensation for actual damage caused by unlawful processing or other breaches of the DPA.
- **Criminal law sanctions:** The Commissioner is not competent to issue any fines. However, based on article 34 DPA, the competent criminal judge may, upon a complaint, sanction private persons with a fine of up to CHF 10,000 if they have wilfully breached certain information obligations stipulated in the DPA.

4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?

The topic of cyber security is addressed by a number of legal provisions and initiatives:

- The DPA and the DPO set forth certain general security requirements applicable to the IT infrastructure deployed when processing personal data. Such requirements are accompanied by the Commissioner’s guide for technical and organisational measures to be taken when processing personal data. It is to be noted that the current DPA does not require data processors to notify a Swiss authority or the data subject concerned of personal data breaches.
- The Swiss Criminal Code (“**SCC**”) provides for statutory offences which protect IT infrastructure against cybercrime (i.e. against the unauthorised obtaining of data, unauthorised access to a data processing system, data corruption, etc.).
- The Reporting and Analysis Centre for Information Assurance MELANI supports private computer and internet users as well as providers of critical national infrastructures (such as banks, telecommunication services providers, etc.) as regards to risks relating to the use of modern information and communication technologies.

In 2011, Switzerland ratified the Council of Europe Convention on Cybercrime of 2001 (which entailed certain amendments of the SCC and the Swiss Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981).

4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.

The Swiss rules on the prevention of money laundering and terrorist financing are set forth in the AMLA, the Anti-Money Laundering Ordinance (“**AMLO**”), ordinances and circulars of FINMA as well as the rulebooks of recognised self-regulatory organisations. Generally speaking, anti-money laundering (“**AML**”) regulation applies to so-called financial intermediaries (and partially to merchants accepting large sums, i.e. more than CHF 100,000, as payment in commercial transactions). On the one hand, certain prudentially regulated entities such as e.g. banks, securities dealers, fund management companies and life insurance undertakings qualify as financial intermediaries based on their regulatory status (*per se* financial intermediaries). On the other hand, any otherwise unregulated person or entity can qualify as a financial intermediary by virtue of its professional activities. In general, this refers to any person that, on a professional basis, accepts or holds on deposit third-party assets or that assists in the investment or transfer of such assets.

Many fintech business models include elements that lead to their operators qualifying as financial intermediaries. If this is the case and no exemptions are available, the fintech firm is required to either join a recognised Swiss AML self-regulatory organisation or, alternatively, submit to direct AML supervision by FINMA. In this context, the firm is required to comply with certain duties on an ongoing basis, in particular the duty to verify the identity of customers and the beneficial ownership in the relevant assets as well as documentation, reporting and audit requirements. In a push to eliminate barriers for technology-based business models, FINMA has introduced a new circular that enables onboarding of customers via digital channels, e.g. by means of video transmission and other forms of online identification. This model has also been replicated in the rulebooks of recognised AML self-regulatory organisations.

The AMLA includes specific criminal provisions sanctioning the violation of duties under AML regulation. In addition, certain offences in the area of corruption and money laundering are set forth in general criminal law, meaning that they apply to fintech (and other) firms regardless of their qualification as a financial intermediary.

4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?

Aside from financial regulation in various areas (see question 3.1 *et seq.*) and the data protection regime (see question 4.1 *et seq.*), fintech firms have to comply with general corporate and civil law provisions as well as with Swiss competition law on the basis of the Unfair Competition Act. Furthermore, depending on the specific business model, the Telecommunications Act may apply.

5 Accessing Talent

5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?

Swiss employment law is based on the principle of freedom of contract and, overall, relatively liberal. Private employment contracts can usually be terminated quite easily and, as a general principle, terminations do not lead to any obligations to render severance payments. Nevertheless, the principle of freedom to terminate the employment contract is limited in two ways. First, there is a protection from unlawful dismissal (*missbräuchliche Kündigung*). A notice of termination is *e.g.* unlawful where given because of an attribute pertaining to the person of the other party or because the other party in good faith asserts claims under the employment relationship. The party having received the unlawful notification may raise a claim for compensation up to a certain threshold. Furthermore, there are some restricted periods during which the parties are not allowed to terminate the employment contract (*Kündigung zur Unzeit*; *e.g.* during a certain period while the employee through no fault of his own is partially or entirely prevented from working by illness or accident or during the pregnancy of an employee and the 16 weeks following birth).

Furthermore, Swiss employment law *e.g.* provides for special rules to be met in cases of mass redundancies.

5.2 What, if any, mandatory employment benefits must be provided to staff?

The employer must pay its employees the agreed or customary salary or the salary fixed by standard employment or collective employment contracts. No statutory minimum salary exists in Switzerland, but for certain professions, collective and standard employment agreements stipulate minimum salaries.

The employer may, and in some cases must, make deductions from the salary. Social insurance premiums are paid either by the employer alone, or by the employer and the employee together, the employer deducting the employee's portion of social insurance premiums from the employee's salary. Further deductions are made for unemployment insurance and non-professional accident insurance. The premiums for mandatory occupational pension

schemes are fixed by the relevant institutions and borne collectively by the employers and the employees. Health insurance premiums are, unless otherwise agreed, borne by the employees and handled separately from the employment.

The parties are, in principle, free to determine the regular weekly working time. Typically, for full-time employment, a weekly working time between 40 and 44 hours is agreed upon. Overtime hours must be compensated in principle (by remuneration or leisure time). However, public law provisions limit the maximum working time (to 45 hours or 50 hours per week, respectively).

Employers in Switzerland must allow their employees to have at least four weeks holiday per year, and in the case of employees under the age of 20 at least five weeks' holiday (excluding public holidays). Part-time employees have a *pro rata* entitlement. During the holidays, the employer must pay the full salary.

If the employee is prevented from working due to personal circumstances for which the employee is not at fault, *e.g.* illness, accident, legal obligations or public duties, the employer must pay the employee a salary for a limited time provided that the employment relationship lasted or was concluded for longer than three months. Furthermore, a female employee is entitled to maternity leave of at least 14 weeks. Paternity leave is currently not granted under Swiss law, but may be agreed upon by the parties.

5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

Switzerland has a dualistic system for the admission of foreign workers. Nationals from EU/EFTA countries can benefit from the Agreement on the Free Movement of Persons (*Personenfreizügigkeitsabkommen*). They do not need a work permit if they work for less than 90 days per calendar year for a company in Switzerland. The same applies to self-employed service providers and companies based in these countries sending workers to Switzerland if the employees have held a valid EU work permit for at least 12 months prior to their assignment to Switzerland. All EU/EFTA citizens being employed by a company in Switzerland for longer than 90 days per calendar year are required to obtain either (i) a short-term permit for up to four months uninterrupted stay or 120 days per year, (ii) a short-term permit for up to one year, its validity depending on the validity period of the limited employment contract (the "L-Permit"), (iii) a long-term permit for five years based on an unlimited employment contract (the "B-Permit"), or (iv) a so-called border-crosser permit if they continue to live outside of Switzerland but commute to their Swiss workplace (the "G-Permit").

In contrast, non-EU/non-EFTA citizens have to apply for either (i) a short-term permit up to four months/120 days per calendar year, (ii) a short-term permit up to 12 months based on a limited employment contract (the "L-Permit"), or (iii) a long-term permit that is valid for an unlimited period but needs to be renewed annually based on an unlimited employment contract (the "B-Permit"). The work permits for citizens of non-EU/non-EFTA countries are subject to a nationwide quota. Furthermore, such permits are only granted to highly qualified employees. In case the person was not assigned from a foreign company to a Swiss affiliate (intra-group transfer) it must be shown that no appropriate candidate throughout Switzerland and EU/EFTA countries can be found.

Special rules apply for persons holding a work permit of one of the EU/EFTA countries for more than one year being employed by

an employer with domicile in the EU-/EFTA-area. Such persons can be assigned to Switzerland for up to 90 days per calendar year without meeting the requirements as set forth above.

Non-EU/non-EFTA citizens wishing to start working on a self-employed status must submit an application together with a business plan, proof of financial means and a certificate of registration. The competent authority will review the business plan and assess the relevant market situation.

There are no additional hurdles regarding immigration rules for the financial sector.

6 Technology

6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

Assuming that fintech products are typically based on computer programs, they are protected by copyrights if they possess an individual character (*i.e.* if they are original). In practice, this threshold is met by novelty or absence of triviality in comparison to existing computer programs. Copyrights in computer programs cover the source code and object code. However, the underlying ideas and principles as well as algorithms and formulas used in and for computer programs are not protected. Copyright protection in computer programs expires 50 years after the author deceases. Software that is integral to an invention may be further patented. However, computer programs “as such” are excluded from patentability.

In addition, marketable products are protected by the Unfair Competition Act against their reproduction by technical means without own reasonable efforts. The design of fintech products (portables, wearables, *etc.*) may be further protected for a maximum period of 25 years by designs rights. Unlike the laws of EU Member States, Swiss law does not provide for database rights.

6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

According to statutory Swiss law, where a computer program has been created under an employment contract in the course of fulfilling professional duties and contractual obligations, the employer alone is entitled to exercise the exclusive rights of use. Similar statutory rules apply as regards to designs and inventions (patents). However, unlike the situation regarding computer programs, the acquisition of inventions and designs is subject to the payment of an additional compensation to the employee if they have been created outside the performance of contractual obligations (mandatory claim). Outside employment relationships, the IP rights (copyrights) or the right to apply for IP protection (patents, designs) vest in the person who has created the work, inventions or design.

6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

In Switzerland, only (Swiss) national IP rights are enforceable. This also applies if an IP right has been applied via an international application system (*e.g.* WIPO’s international patent system PCT or the international trademark system) or regional application system (*e.g.* patent applications under the European Patent Convention) and Switzerland has been chosen as designated state in respective applications (the resulting rights are national rights, not multi-jurisdictional rights).

6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

IP rights are basically exploited/monetised by means of assignment (transfer), licensing, and the granting of security interests. There are slightly different formalities for the various IP rights for assignments and licences. Subject to the assignment of copyrights, an assignment must be in writing and signed by the assignor. The recording of the change of ownership in the relevant IP register is not a requirement for the assignment and transfer to the assignee, but may be advisable since a change of ownership not recorded in the register is not relevant for persons who have acquired IP rights in good faith. The written form is not required for licence agreements in general.

Both the licence agreements and the pledge agreements pertaining to trademarks, patents and designs may be entered in the relevant IP register at the request of one of the contractual parties. As a consequence, they become binding on any rights related to trademarks, patents and designs subsequently acquired.

Acknowledgment

The authors would like to thank Eric Stupp for his invaluable assistance in the writing of this chapter. Eric Stupp heads Bär & Karrer’s financial services department and co-heads the fintech and internal investigations practice groups. His practice focuses on advising banks, insurance companies, asset managers and other financial intermediaries on regulatory matters, enforcement proceedings and M&A transactions. In recent years, he has regularly advised financial institutions and regulatory bodies in connection with internal investigations, in particular on cross-border issues. Eric Stupp is the vice-chairman of the board of directors of Goldman Sachs Bank AG, Zurich, and a board member with other financial and nonprofit institutions.

Tel: +41 58 261 50 00 / Email: eric.stupp@baerkarrer.ch

**Dr. Daniel Flühmann**

Bär & Karrer Ltd.
Brandschenkestrasse 90
8002 Zurich
Switzerland

Tel: +41 58 261 50 00
Email: daniel.fluehmann@baerkarrer.ch
URL: www.baerkarrer.ch

Daniel Flühmann is a partner in Bär & Karrer's financial services department and co-head of the fintech practice group. His work focuses on banking, insurance and financial market laws as well as on the area of collective investment schemes. He advises Swiss and foreign banks and securities dealers as well as insurance companies and other financial services providers on regulatory and contract law matters and in the context of enforcement proceedings. A special focus of Daniel Flühmann's practice lies on fintech, both in the context of advising start-up businesses and more established financial institutions, as well as on blockchain technology and the legal framework of its applications in practice. Furthermore, he advises clients on general corporate and commercial matters as well as on M&A transactions.

**Dr. Peter Hsu**

Bär & Karrer Ltd.
Brandschenkestrasse 90
8002 Zurich
Switzerland

Tel: +41 58 261 50 00
Email: peter.hsu@baerkarrer.ch
URL: www.baerkarrer.ch

Peter Hsu is a partner in Bär & Karrer's financial services department and the key contact for the practice area of insurance. His work focuses on banking, insurance, financing and capital markets. He regularly advises Swiss and foreign banks, securities dealers, insurers and other financial intermediaries as well as fintech businesses with regard to a wide range of regulatory and contract law matters and in enforcement proceedings. Moreover, he often advises clients on M&A transactions as well as on general corporate and commercial law matters.

**BÄR
& KARRER**

Bär & Karrer is a renowned Swiss law firm with more than 150 lawyers in Zurich, Geneva, Lugano and Zug.

Our core business is advising our clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. Our clients range from multinational corporations to private individuals in Switzerland and around the world.

Most of our work has an international component. We have broad experience handling cross-border proceedings and transactions. Our extensive network consists of correspondent law firms which are all market leaders in their jurisdictions.

Bär & Karrer was repeatedly awarded Switzerland Law Firm of the Year by the most important international legal ranking agencies in recent years:

- 2016, 2015 and 2014 *Mergermarket* European M&A Awards.
- 2016, 2013 and 2012 *Chambers* Awards.
- 2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").
- 2016 *Trophées du Droit*.
- 2015 and 2014 *IFLR* Awards.
- 2015, 2014, 2013, 2011, 2010 *The Lawyer* European Awards.
- 2015 *Citywealth* Magic Circle Awards ("Law firm of the Year – EMEA").
- 2014 *Citywealth* International Financial Centre Awards.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com