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Regulation of Electronic Payment Service Providers in Switzerland

An Overview with a Focus on Retail Payment Services

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I. Introduction

The financial sector has undergone major developments in the past years and continues to be transformed by disruptive innovations as well as constant changes to the global regulatory framework. New business models that blend together technology and financial services (FinTech) challenge the traditional concepts of financial regulation. New types of payment systems and technology-based payment services, particularly in the retail sector, are a key focus area in the growing field of FinTech. The Swiss financial market regulator has taken a welcoming stance towards innovation in the financial sector, modifying its regulation to be as technology-neutral as possible and launching new law-making projects to lower the market entry barriers for FinTech innovators (*see* section II.6 below). A dynamic Swiss FinTech industry should contribute significantly to the quality and competitiveness of Switzerland as a financial center.¹

«Classic» payment methods such as cash, debit or credit cards still enjoy great popularity among consumers in Switzerland.² At the same time, electronic payment services such as Apple Pay, PayPal, Twint and Paymit (with

¹ Cf. *inter alia* press release by the Swiss Federal Council dated 1 February 2017, available under: <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-65476.html>>; press release by the Swiss Federal Council dated 2 November 2016, available under: <<https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-64356.html>>; cf. also press release by FINMA dated 17 March 2016, available under: <<https://www.finma.ch/en/news/2016/03/20160317-mm-fintech/>>; MARK BRANSON, Speech to the Zurich Business Club, Zunfthaus Saffran, Zurich, 10 September 2015, 1 *et seqq.*, available under: <<https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/20150910-vortrag-fintech-bnm.pdf?la=en>>.

² By contrast, cash transactions are quickly becoming almost non-existent in Scandinavia. *E.g.*, in Sweden, cash transactions barely made up 2% of the value of all payments in 2015 – a figure some see dropping to 0,5% by the year 2020 (*cf.* newspaper article in the Guardian dated 4 June 2016, available under: <<https://www.theguardian.com/business/2016/jun/04/sweden-cashless-society-cards-phone-apps-leading-europe>>). The trend away from cash is also clearly apparent in Denmark, Finland and Norway (*cf.* newspaper article in the Huffington Post dated 15 April 2016, available under: <http://www.huffingtonpost.de/2016/04/15/bargeld-abschaffung-danemark-schweden_n_9698980.html>).

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the latter two services on the verge of a merger into a combined solution³) are rapidly gaining both practical and economic significance. In addition to being practical and convenient, such services may also contribute to reducing money transfer costs and improving access to financial services.⁴

While innovation in the area of payments is in large part driven by industry-independent players from the technology sector⁵, most services rely to some extent on existing payment systems, networks and infrastructure operated by banks and other traditional financial service providers⁶. The involvement of one or several additional service providers at various stages of the payment process, particularly at the interface between customers or merchants and the payment systems and networks in the technical sense (e.g. the credit card or bank payment infrastructure), is a characteristic feature of advanced payment services. These service providers operate electronic platforms and gateways to create a seamless payment experience for consumers or to facilitate the acceptance of various means of payment by merchants. As a result of the entry of new market participants, the competitive pressure on traditional financial service providers has increased.

The additional players and new business models in the payment space also create challenges for financial regulators as they are faced with having to categorize and potentially supervise payment service providers. So far, Switzerland has not put in place any comprehensive, specific regulation to address these challenges. It instead relies on the flexibility and technology-neutrality of existing financial market regulation. By contrast, the European Union («EU») has been regulating payment services, payment service providers and electronic money institutions for years under the Payment Services Directive⁷ («PSD») and under the E-Money Directive⁸ («EMD»). The revised PSD II⁹ that entered into force

last year focuses *inter alia* on online payments and third party payment service providers.¹⁰ The very detailed directives reflect the general approach to financial regulation in the EU. It is not surprising that Switzerland has been less aggressive in regulating the payment space given its more principle-based concept of regulation.

Current Swiss regulation was designed with traditional financial service providers and the risks relating to their businesses in mind. It has recently been questioned whether it adequately addressed innovative financial services, including new payment services.¹¹

The present article provides an overview of the Swiss regulatory framework, general limitations for payment service providers, and recent proposals to amend the regulation in view of technology-based innovation in the financial sector (see section II below). Furthermore, it analyzes various electronic payment systems for use by consumers, both peer-to-peer («P2P») and person-to-business («P2B»), and the classification of the operators of these systems under applicable financial regulation, also touching on the challenges for cross-border services into Switzerland (see section III below). Inter-bank payment and settlement mechanisms or payment systems for use by financial institutions are not discussed in this article. Various aspects of the provision of payment services that are not governed by financial regulation, such as data protection, competition, general corporate and contract law aspects, are likewise not discussed in this article.

II. Swiss Regulatory Framework

1. General Remarks

Payment systems and the service providers and auxiliaries involved in running them operate in a highly regulated space and are potentially exposed to license or registration requirements, as well as to regulatory compliance requirements in the broader sense. The impact of Swiss financial regulation on a particular business model in the area of payments depends, *inter alia*, on whether a service provider is domiciled in Switzerland or abroad, operates through a local physical presence or on a pure cross-border basis, and on whether it services either or

³ Paymit and Twint announced that they will merge their payment systems under the combined name Twint. The rollout of the new Twint app is expected in April 2017 (Twint press release dated 8 December 2016, available under: <<http://www.paymit-twint.ch/medien/twint-wird-das-digitale-portemonnaie-der-schweiz>>).

⁴ Decision of the Swiss Federal Supreme Court 2C_345/2015 dated 24 November 2015, consid. 4.2.

⁵ Cf. *inter alia* FRANCA CONTRATTO, «Regtech»: Digitale Wende für Aufsicht und Compliance, Jusletter dated 15 August 2016, 3.

⁶ FEDERAL DEPARTMENT OF FINANCE, Explanatory Report on the Amendment of the BankA and BankO dated 1 February 2017, 8.

⁷ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

⁸ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.

⁹ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the inter-

nal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

¹⁰ Cf. FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 23.

¹¹ Cf. SIMON SCHÄREN/GÜNTHER DOBRAUZ-SALDAPENNA, Neueste Entwicklungen in der FinTech-Regulierung, Regulierungsagenda zur Digitalisierung der Schweizer Finanzbranche, Expert Focus 8/16, 542 *et seq.*, 544.

both the payor and the payee or other service providers and intermediaries.

Payment systems may qualify as financial market infrastructures, which are governed by the Financial Market Infrastructure Act¹² («FMIA»). However, there is no specific, comprehensive regulation of *payment service providers*. Therefore, it has to be assessed in each individual case whether a payment service provider, by virtue of its (intended) activities, falls within the scope of Swiss financial market laws, most importantly the Banking Act¹³ («BankA») and/or the Anti-Money Laundering Act¹⁴ («AMLA»). Moreover, the Consumer Credit Act¹⁵ («CCA») and the National Bank Act¹⁶ («NBA») may apply. Furthermore, implementing ordinances of the aforementioned laws as well as circulars and supervisory messages of the Swiss Financial Market Supervisory Authority FINMA («FINMA») need to be considered.

The following overview of the Swiss regulatory framework focuses on license, registration and other compliance requirements under the FMIA, the BankA, the AMLA and the CCA which may be relevant for payment service providers. It also addresses cross-border operations as they can be of significant importance for payment service providers. It is typical for payment service providers to operate across jurisdictional borders in order to provide their customers with a broad scope of jurisdictions in which payments can be made or received, not least with a view to the soaring popularity of online shopping.

This section further discusses proposed new legislation that aims at easing the regulatory framework for FinTech operators in Switzerland (see section II.6 below).

2. Regulation of Financial Market Infrastructures

2.1 Scope of Application of the FMIA

The FMIA sets forth various regulatory requirements for so-called *financial market infrastructures*, which also include *payment systems*. The law rather broadly defines a payment system as an entity or undertaking that «clears and settles payment obligations based on uniform rules and procedures» (art. 81 FMIA). Based on this definition, credit, debit and store card systems that enable pay-

ments,¹⁷ web- or mobile-based payment systems such as PayPal and Apple Pay as well as virtual currencies such as Bitcoin in principle qualify as payment systems within the meaning of the FMIA.¹⁸ Their operators (to the extent applicable, e.g. with regard to decentralized cryptocurrencies) might therefore require a license as a financial market infrastructure.

However, according to the dispatch (*Botschaft*) of the Swiss Federal Council regarding the FMIA, payment systems are not generally covered by the protective purpose of the FMIA.¹⁹ Payment systems that are not operated by a bank are therefore only subject to a license requirement and other provisions of the FMIA *if necessary* for the functioning of the Swiss financial market or the protection of financial market participants (art. 4 para. 1 and 2 FMIA). The necessity for a license arises in particular if a payment system (a) intends to process and clear payment transactions among financial intermediaries, i.e. as opposed to payments among individuals and businesses, and (b) the Swiss National Bank («SNB») determines that the payment system is systemically relevant.²⁰ So far, only the Swiss Interbank Clearing system SIC has been designated by the SNB as a systemically relevant payment system.²¹

A payment service provider, even if it were itself deemed a payment system, will therefore generally not be required to obtain a license under the FMIA.

2.2 Cross-Border Aspects

The FMIA primarily applies to *domestic financial market infrastructures*, i.e. legal entities incorporated under Swiss law with registered office and main administration in Switzerland. Foreign financial market infrastructures only fall within the scope of the FMIA if specifically provided for in the law.²² There is no such specific provision for payment systems. Therefore, in principle, foreign payment systems do not require a license under the FMIA, even in case of a cross-border supply of services into the territory of Switzerland, and regardless of the

¹² Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading dated 19 June 2015, SR 958.1.

¹³ Federal Act on Banks and Savings Banks dated 8 November 1934, SR 952.0.

¹⁴ Federal Act on Combating Money Laundering and Terrorist Financing dated 10 October 1997, SR 955.0.

¹⁵ Federal Act on the Consumer Credit dated 23 March 2001, SR 221.214.1.

¹⁶ Federal Act on the Swiss National Bank dated 3 October 2003, SR 951.11.

¹⁷ Cf. BSK BankG-BAHAR/STUPP, art. 1^{bis} N 3a, with regard to the definition in art. 2 Abs. 1 lit. i of the revised Ordinance to the Federal Act on the Swiss National Bank (status as of 10 March 2015) which corresponds materially to the new definition in art. 81 FMIA.

¹⁸ HARALD BÄRTSCHI/CHRISTIAN MEISSER, *Virtuelle Währungen aus finanzmarkt- und zivilrechtlicher Sicht*, in: Weber/Thouvenin (eds.), *Rechtliche Herausforderungen durch webbasierte und mobile Zahlungssysteme*, Zurich/Basel/Geneva 2015, 113 et seqq., 119; cf. also BSK BankG-BAHAR/STUPP, art. 1^{bis} N 3a.

¹⁹ The aim of the FMIA is to ensure the proper functioning and transparency of the securities and derivatives markets, the stability of the financial system, the protection of financial market participants as well as the equal treatment of investors (art. 1 para. 2 FMIA).

²⁰ Dispatch of the Swiss Federal Council on the FMIA dated 3 September 2014, BBl 2014 7483, 7517.

²¹ Cf. information available under: <http://www.snb.ch/en/i/about/finstab/finover/id/finstab_systems#t2>.

²² Cf. art. 41, 60 and 80 FMIA regarding the recognition of foreign trading venues, central counterparties and transaction registers.

importance and risks of their operations for the Swiss financial market and its participants. They may however be subject to other Swiss license or registration requirements (*see further below*).

2.3 Excursus: Scope of Application of the NBA

Irrespective of a license requirement under the FMIA, the SNB is, to the extent necessary for an analysis of financial market developments or for drawing up the balance of payments, entitled to collect statistical data on the business activities from issuers of payment instruments and from operators of systems for the processing, clearing and settlement of payment transactions (art. 15 para. 2 NBA). *E.g.*, payment systems operators settling payments that exceed CHF 100 million per financial year (excluding so-called in-house payment systems) have a monthly reporting duty. In connection with the SNB's survey regarding payment cards and other payment instruments, the issuers and acquirers (including ATM acquirers) of credit cards and debit cards are required to provide information on a monthly basis if they settle payments that exceed CHF 100 million per financial year. For issuers and acquirers of e-money, the threshold is even lower at CHF 50 million.²³

Both domestic and foreign payment systems are subject to supervision by the SNB if they are classified as systemically relevant.²⁴ In order to protect the stability of the Swiss financial system, art. 19 para. 2 NBA stipulates that foreign systemically relevant financial market infrastructures are supervised by SNB if they conduct a substantial part of their operations or service significant participants on the Swiss market or if they clear or settle significant transaction volumes in Swiss francs. Currently, the SNB only classifies the foreign exchange settlement system Continuous Linked Settlement (CLS) as a foreign systemically relevant payment system.²⁵

3. Banking Regulation

3.1 Scope of Application of the BankA

The BankA applies to banks (art. 1 para. 1 BankA). Banks within the meaning of the BankA are persons that are mainly active in the financial sector²⁶ and that on a professional basis accept or solicit the acceptance of deposits from the public (*gewerbsmässige Entgegennahme*

von Publikumseinlagen; art. 2 para. 1 lit. a of the Banking Ordinance²⁷; «BankO»²⁸).

Deposits are created by a person undertaking a liability in the form of a repayment obligation towards a third party (*i.e.* a member of the public).²⁹ The term «deposits from the public» is defined in a very comprehensive manner to capture *all liabilities towards clients*, unless one of the exemptions exhaustively listed in the BankO applies (art. 5 para. 1–3 BankO; *see further section II.3.2 below*).³⁰

Deposit-taking is considered a *professional activity* when a person (a) accepts, on a recurring basis, more than 20 individual deposits from the public, or (b) publicly solicits deposits, regardless of the number of deposits actually received (art. 6 BankO).

The rendering of payment services generally requires service providers to temporarily hold third party funds. For example, a payment system may be based around customers maintaining an electronically registered account balance (*e-money*) for later use in payment transactions. Such a system requires the payment service provider to hold the funds received from the customers for their benefit. Even if a payment system does not allow customers to maintain account balances, the execution of payment transactions usually involves money passing through the payment service provider's client money accounts before it is passed on to the end recipient. In these or similar circumstances, a payment service provider can be seen as accepting deposits from the public within the meaning of the BankA.

As this type of activity exposes customers to the default risk of the payment service provider, its conduct on a professional basis is in principle reserved to persons that have obtained a banking license (art. 1 para. 2 BankA).³¹

²³ Annex to the Ordinance to the Federal Act on the Swiss National Bank of 18 March 2004, SR 951.131.

²⁴ *Cf.* dispatch on the FMIA (FN 20), 7517.

²⁵ *Cf.* information available under: <http://www.snb.ch/en/i/about/finstab/finover/id/finstab_systems#t3>.

²⁶ Considered to be active in the financial sector are *inter alia* persons providing or intermediating financial services, in particular operating the deposit or lending business, securities trading, asset or wealth management or the asset management, be it on their own behalf or on behalf of third parties (art. 4 para. 1 lit. a BankO).

²⁷ Ordinance on Banks and Savings Banks dated 30 April 2014, SR 952.02.

²⁸ Furthermore, are considered banks any persons that refinance themselves in an amount exceeding CHF 500 million (averaged over the past four financial quarters) with more than five unaffiliated banks in order to finance an undetermined number of unrelated parties in any manner (art. 2 para. 1 lit. b BankO, as implemented in practice by FINMA). However, this definition rarely comes to bear in practice, if ever, and is rather unlikely to apply to payment service providers.

²⁹ *Cf. inter alia* FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 12 *et seq.*; decision of the Swiss Federal Supreme Court BGE 136 II 43, consid. 4.2.

³⁰ *Cf. inter alia* decision of the Swiss Federal Supreme Court 2C_345/2015 (FN 4), consid. 6.3 with further references; FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 13; FINMA-Circular 2008/3, N 10; FLORIAN SCHÖNKNECHT, Der Einlagebegriff nach Bankengesetz, GesKR 3/2016, 300 *et seq.*, 300 *et seq.*

³¹ *Cf.* FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 2, 14; press release by the Swiss Federal Council dated 20 April 2016, available under: <<https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-61427.html>>; BENEDIKT MAURENBRECHER/DANIEL HAE-BERLI/URS MEIER, Legal Framework, IFZ FinTech Study 2016, 14; SCHÄREN/DOBRAU-SALDAPENNA (FN 11), 544.

Banks as prudentially supervised financial institutions are subject to highly demanding organizational and financial requirements (*cf.* art. 3 *et seqq.* BankA). These usually make it impractical or economically not feasible for a payment service provider to obtain or maintain such regulatory status. Therefore, payment service providers in Switzerland generally have to structure their business in a way that it fits within one of the exemptions from deposit-taking listed in the BankO (*see* section II.3.2 below), which can be challenging. The proposed revisions to the BankA and the BankO aimed at supporting FinTech business models are expected to facilitate the structuring of a compliant payment service business model (*see* section II.6 below).

3.2 Exemptions Available to Payment Service Providers

The exhaustive catalogue of exemptions from deposit-taking from the public in the BankO is divided into the following two categories:

- (a) deposit-taking from counterparties that are not considered part of the «public», such as banks, financial institutions, institutional investors, shareholders, employees and other related persons (art. 5 para. 2 BankO);
- (b) types of liabilities that do not qualify as «deposits» (art. 5 para. 3 BankO, *see* bullet list below).

FINMA has set out its practice with regard to the qualification of deposit-taking activities in the FINMA-Circular 2008/3 – Deposits from the Public with Non-Banks.

Only few exemptions listed in the BankO and the FINMA-Circular 2008/3 are potentially relevant for payment services, in each case depending on the envisaged business model. In practice, generally speaking, only the exemptions based on the type of liability or service are useful. The exemptions referring to the type of counterparty do not offer meaningful relief in the area of retail payments.

- *Settlement accounts* (art. 5 para. 3 lit. c BankO; FINMA-Circular 2008/3 N 15 *et seqq.*): Funds held on client accounts of securities or precious metals dealers, asset managers or similar institutions are not considered deposits within the meaning of the BankA if (a) they are only held for the purpose of settling customer transactions, and (b) the account does not carry any interest. These restrictive requirements intend to ensure a quick turnaround to limit the period during which the customer is exposed to the counterparty risk of the service provider maintaining the settlement account.³² While the law does not specify a time period during which third party monies can be held in a settlement account without qualifying

as deposits, FINMA has in its practice established a maximum period of 7 *days* (it is however proposed to extend this period to 60 days for all market actors except securities dealers; *see* the overview of proposed new FinTech regulation in section II.6 below). Furthermore, from a functional perspective, the settlement account exemption is limited to *accounts that serve the sole purpose of holding the necessary liquidity for the settlement of a main transaction*. Moreover, the Swiss Federal Supreme Court ruled that funds held on settlement accounts are only exempted from the BankA to the extent that the relevant *main transaction has already been organized or is imminently foreseeable* rather than having yet to be negotiated.³³ Other customer balances held with financial intermediaries are not covered by the exemption. Payment service providers are not expressly included in the list of undertakings that can potentially profit from the exemption. Nevertheless, there is little doubt that they can be understood as «similar institutions», also because the FINMA-Circular 2008/3 only explicitly excludes foreign exchange dealers. The Federal Department of Finance clarified in its explanatory report in connection with the consultation procedure regarding new FinTech regulations that payment services offering a «pure» transfers of funds, *i.e.* unrelated to a purchase of goods or services, benefit from the exemption in art. 5 para. 3 lit. c BankO, provided that the funds are passed on to the payment recipient within the maximum holding period.³⁴ This is in particular helpful in the context of P2P payments.

- *Payment instruments/payment systems* (art. 5 para. 3 lit. e BankO; FINMA-Circular 2008/3 N 18^{bis}): Monies that are transferred onto some form of payment instrument or into a payment system are exempt from the qualification as deposits, provided that (a) such monies solely serve the purpose of effecting future purchases of goods or services, (b) the maximum balance per customer and issuer of a payment instrument or operator of a payment system never exceeds CHF 3,000, and (c) no interest is paid. Discounts or other monetary incentives may only be granted on the goods and services and must not depend on the amount of the outstanding balance (*i.e.*, no «indirect» interest payments).³⁵ This exemption is tailored towards payment system operators and payment service providers (the FINMA-Circular refers to card-based payment systems as well as internet and mobile phone payments). Its relevance in practice is limited, however, due to the maximum allowed balance and the required direct link to a purchase of

³³ Decision of the Swiss Federal Supreme Court 2C_929/2010 dated 13 April 2011, *consid.* 3.4.2.

³⁴ FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 14.

³⁵ FINMA-Circular 2008/3, N 18^{bis}.

³² FINMA-Circular 2008/3, N 16.

goods or services. It has the character of a *de minimis* exemption, carving out a space in which supervision under banking regulation is considered disproportionate to the risk profile of certain types of payment instruments or payment services.³⁶

- *Default guarantee* (art. 5 para. 3 lit. f BankO; FINMA-Circular 2008/3 N 34): While not an exemption from deposit-taking *per se*, the acceptance of deposits by non-banks is permitted if a bank within the meaning of the BankA guarantees the repayment of the deposits as well as the agreed interest in the event of a default of the payment service provider.³⁷

The other exemptions of the BankO are usually not applicable in the context of payment services. For example, funds that constitute compensation under a sales or services contract or that are transferred as a security are not considered deposits (art. 5 para. 3 lit. a BankO; FINMA-Circular 2008/3 N 34).³⁸ This exemption can only be invoked by the person entitled to the compensation under the relevant agreements and not by a third party service provider relaying such payments.

3.3 Cross-Border Aspects

Switzerland maintains a liberal inbound cross-border regime for banking services. Foreign banks (*Ausland-banken*) can provide services to Swiss customers without triggering a license requirement as long as they do not formally or factually establish a relevant physical presence on Swiss territory or incorrectly represent that they are based or physically present in Switzerland (e.g., by way of a «.ch» website, the use of Swiss contact phone numbers or other elements referring to Switzerland).³⁹ Conversely, the establishment of a physical presence of a foreign bank in Switzerland is potentially subject to license requirements under the BankA and the FINMA Foreign Bank Ordinance⁴⁰ («FBO-FINMA»). This can be relevant for foreign payment service providers if their activity or foreign regulatory status causes them to qualify as foreign banks from a Swiss law perspective and they intend, in addition, to employ persons that are physically present in Switzerland (including, e.g., by frequently travelling to Switzerland for business purposes).

A foreign bank within the meaning of the FBO-FINMA is any institution organised under a foreign law (and domiciled outside of Switzerland) that (art. 1 para. 1 FBO-FINMA):

- holds a foreign banking license;
- uses the term «bank» or «banker» in its trade name, business purpose or business documents; or
- conducts banking activities as defined by the BankO (*see* section II.3.1 above).

Para. (c) is particularly notable because it is based on an assessment of activities conducted outside of Switzerland from a Swiss law perspective, meaning that a foreign legal entity may qualify as a foreign bank even if it does not qualify as a bank in its home jurisdiction and/or does not hold a banking license in such jurisdiction. In the case of payment service providers, this type of mismatch cannot be entirely excluded if, for example, foreign payment service provider licenses allow for, and the relevant provider engages in, deposit-taking, even if it is limited for payment purposes, but outside the scope of the exemptions discussed in section II.3.2 above.

An institution qualifying as a foreign bank under the FBO-FINMA is required to obtain an authorisation from FINMA if it maintains a relevant physical presence in Switzerland. This is the case if such institution employs persons in Switzerland who, permanently and in a professional capacity, in or from Switzerland:

- conclude transactions, maintain customer accounts or legally bind the foreign bank (activity of a branch); or
- are active in a manner other than mentioned under para. (a) above, namely by forwarding client orders to the foreign bank or by representing it for advertising or other purposes (activity of a representative office).

By contrast, pure cross-border banking activities from abroad into Switzerland, *i.e.* without any physical presence in the meaning outlined above, do not trigger a Swiss license requirement. In our view, a physical presence can only be relevant from a regulatory perspective if the persons located in Switzerland engage in activities that are part of the regulated business. If a foreign bank employs persons in Switzerland for other purposes such as IT or back-office services, this would not qualify as a Swiss physical presence subject to a license requirement.

The BankA applies by analogy to branches and representative offices of foreign banks (art. 2 para. 1 BankA). This means that FINMA will in practice only grant a Swiss branch or representative office license to an institution that is licensed as a bank abroad. In the hypothetical mismatch scenario outlined above, if the relevant foreign payment service provider were to consider establishing a Swiss presence, this could in the worst case result in a license requirement without the possibility to actually obtain such license. While it can generally be expected that FINMA would approach this conundrum in a pragmatic manner, the proposed revisions to the BankA and the BankO with respect to FinTech will in our view help

³⁶ Cf. BSK BankG-BAHAR/STUPP, art. 1 N 16.

³⁷ FINMA-Circular 2008/3, N 34.

³⁸ For example, advance payments under purchase agreements, retainers under agency contracts or lease deposits are excluded from the scope of deposit-taking; *see* FINMA-Circular 2008/3, N 12.

³⁹ Cf. BSK BankG-BAHAR/STUPP, art. 1 N 83 *et seq.*

⁴⁰ Ordinance of the Swiss Financial Market Supervisory Authority on Foreign Banks in Switzerland dated 21 October 1996, SR 952.111.

to reduce the practical discrepancies between Swiss and foreign license types.

4. Anti-Money Laundering Regulation

4.1 Scope of Application of the AMLA

Activities of in the field of payment services regularly qualify as so-called *financial intermediation* in the meaning of the AMLA, potentially triggering regulatory requirements in connection with combating money laundering and financing of terrorism (anti-money laundering; «AML») for the relevant payment service providers.

Financial intermediaries pursuant to the AMLA include, on the one hand, certain prudentially regulated entities such as banks, securities dealers, fund management companies and life insurance undertakings (*per se* financial intermediaries), in some cases subject to their being engaged in certain specific activities such as the distribution of interests in collective investment schemes (art. 2 para. 2 AMLA). On the other hand, a person can qualify as financial intermediary by virtue of its professional activities. In general, this refers to any person that, on a professional basis, accepts or holds deposit assets belonging to others or who assists in the investment or transfer of such assets (art. 2 para. 3 AMLA). As a rule of thumb, financial intermediaries are usually vested with a power of attorney or other form of authorization to dispose over third party assets.

The AMLA includes an illustrative list of activities qualifying as financial intermediation. These include *services related to payment transactions*, in particular the carrying out of electronic transfers on behalf of other persons, or the issuance and management of means of payment such as credit cards and travellers' cheques, as well as the *business of lending* (art. 2 para. 3 lit. a and b AMLA). Payment service providers with activities in these areas fall under the AMLA, provided that they exceed the *de minimis* thresholds defining a professional activity pursuant to art. 7 *et seqq.* of the Anti-Money Laundering Ordinance⁴¹ («AMLO»), *i.e.*: (a) gross annual profits of more than CHF 50,000, (b) more than 20 contractual parties per calendar year, (c) power of attorney to dispose over third party assets in excess of CHF 5 million at any given point in time, or (d) an annual transaction volume exceeding CHF 2 million. Lending in particular qualifies as a professional activity if (a) it yields gross annual profits of more than CHF 250,000, or (b) a credit volume exceeding CHF 5 million is outstanding at any given point in time (art. 8 para. 1 AMLO).

The AMLO further fleshes out the term «services related to payment transactions». While the list of specific activities is non-exhaustive, it covers most areas in which payment service providers might conceivably conduct business. Relevant activities of a financial intermediary include (art. 4 para. 1 lit. a–c and para. 2 AMLO):

- (a) transmitting liquid financial assets on behalf of a contracting party to another person, where the financial intermediary in the course of such activity (i) takes physical delivery of such assets, (ii) has such assets credited onto an own account, or (iii) directs the transfer of such assets in the name and on behalf of its contracting party;
- (b) issuing or managing non-cash payment instruments that are used by the contracting party of the financial intermediary to make payments to third parties; or
- (c) carrying out the so-called money or asset transfer business, defined as transferring assets by accepting cash, precious metals, virtual currency, checks or other payment instruments and (i) paying out corresponding sums in cash, precious metals or virtual currency, or (ii) effecting non-cash transfers using a payment or settlement system.

FINMA has detailed its relevant regulatory practice in the recently revised FINMA-Circular 2011/1 – Activity as a Financial Intermediary under the AMLA. With regard to para. (a) above, the key aspect according to the circular is the power of the financial intermediary, granted to it by its contracting party, to dispose over financial assets of the latter (*Verfügungsmacht über fremde Vermögenswerte*).⁴² Within this context, the transfer or forwarding of assets on behalf of the *debtor* of the relevant obligation (*i.e.* the payor) is considered financial intermediation. Mere debt collection on behalf of the *creditor* of an obligation (*i.e.* the payee/recipient), by contrast, is exempted from the AMLA (*see* further section II.4.2 below).

With regard to para. (b) above, the issuance of payment instruments⁴³ (*e.g.*, non-rechargeable e-money data carriers) or the operation of payment systems⁴⁴ (*e.g.*, rechargeable e-money data carriers, credit cards or debit cards) that enable *third parties* to transfer assets are considered activities of a financial intermediary. The circular further specifies that the issuer of such payment instrument or the operator of such payment system, respectively, must not be identical with its users, meaning that two-party systems are not captured by the AMLA

⁴¹ Ordinance on Combating Money Laundering and Terrorist Financing dated 11 November 2015, SR 955.01.

⁴² FINMA-Circular 2011/1, N 58.

⁴³ According to the circular, the term «*payment instrument*» covers all payment instruments the value of which is fixed at the point in time of issuance (FINMA-Circular 2011/1, N 64).

⁴⁴ According to the circular, the term «*payment system*» covers systems that either enable access to a stored balance or allow the recording of a debt that is subsequently invoiced to the user by the operator of the payment system (FINMA-Circular 2011/1, N 65).

(e.g., if the seller of a good is at the same time the issuer of a payment instrument that can be used to settle the purchase price).⁴⁵ Furthermore, specific rules apply to business models with four parties or more such as typical credit card systems: As a general rule, the party giving the persons that will make payments access to the system is subject to the AMLA. In credit card systems, this is usually the (sub-)licensed national issuer. The acquirer dealing with the merchants is generally exempt from the AMLA.⁴⁶

With regard to para. (c) above, the circular includes no further explanations. Pursuant to art. 9 AMLO, the money or asset transfer business (as, e.g., conducted by Western Union and MoneyGram) is always considered a professional activity, except if conducted for close persons and subject to a *de minimis* threshold of CHF 50,000 gross annual profits.

Financial intermediaries that are not otherwise regulated are subject to limited supervision for AML purposes and must comply with specific duties of due diligence (in particular identification of the contractual counterparty and the beneficial owner of the relevant assets) as well as documentation and reporting requirements (art. 3 *et seqq.* AMLA). Furthermore, such financial intermediaries are required to either (a) join a recognized self-regulatory organization («SRO») for AML purposes, or, in the alternative, (b) obtain a license from FINMA as a so-called directly supervised financial intermediary («DSFI») (art. 14 para. 1 AMLA). For payment service providers, there are limited options to avoid a qualification as financial intermediary under Swiss AML regulation. The AMLO provides for some exemptions and simplified processes that may provide relief in specific cases, however (see section II.4.2 below). Generally speaking, an SRO membership or DSFI license are much less onerous to obtain and maintain than a banking license.

4.2 Exemptions Available to Payment Service Providers

Certain exemptions from the scope of Swiss AML regulation may be relevant for payment service providers depending on their business model, in particular the following:

First, the pure *collection of monies* by a person for itself or on behalf of the *creditor* of a claim (debt collection; *Inkasso*) does not qualify as financial intermediation. Where a payment service provider maintains contractual relationships with both sides of a payment transaction, it must be determined by interpretation on whose behalf it (predominantly) acts. The FINMA-Circular 2011/1 notes that one indication can be which party pays the

consideration for the payment service.⁴⁷ This exemption can be useful for payment service providers that primarily facilitate the acceptance of (card or electronic) payments by merchants, *i.e.* sellers of goods or providers of services. It also conceptually precipitates FINMA's practice to exempt, in a typical four-party credit card system, the acquirer (*i.e.*, the person responsible for the relationship with the merchants wishing to accept a particular credit card) and, by extension, its processing agents, from the scope of AML regulation (see also section II.4.1 above).⁴⁸

Second, the *transferring of assets as an ancillary service* to a primary service is exempt from AML regulation (art. 2 para. 2 lit. a no. 3 AMLO). Similarly, the *ancillary granting of credit* is an exempt activity as well (art. 3 lit. f AMLO). However, both of these exemptions are narrowly interpreted by FINMA. In particular, FINMA requires that the primary service be outside the financial sector, that there be an objective connection between the two and that the financial service be of minor importance.⁴⁹ As a result, the activities of pure payment service providers can rarely fall under the exemptions for ancillary services.

Finally, payment services that adhere to certain limitations may benefit from simplified due diligence obligations. For DSFI, these are set forth in art. 11 of the FINMA Anti-Money Laundering Ordinance⁵⁰ («AMLO-FINMA»), which allows to dispense with customer due diligence obligations for ongoing customer relationships in the area of non-cash payment services that are limited to payments for goods and services (P2B), subject to limitations regarding payment volumes and repayments. Further, art. 12 AMLO-FINMA provides for simplified due diligence documentation requirements in connection with the issuance of payment instruments in the area of P2P and P2B payments, subject to payment volume limitations and in some cases depending on the domicile of payment recipients (*i.e.* domestic or foreign). For financial intermediaries that have joined an SRO, similar simplifications are usually provided for in the SRO regulations, which have to be approved by FINMA. In addition, FINMA has certain discretion to determine on a case-by-case basis whether new technologies allow for an equivalent fulfillment of AML due diligence duties compared to traditional methods (art. 3 para. 2 AMLO-FINMA).

⁴⁷ FINMA-Circular 2011/1, N 8 *et seq.*

⁴⁸ Cf. FINMA-Circular 2011/1, N 67 *et seq.*; Anti-Money Laundering Control Authority, Compilation on applicability, N 212 *et seq.*, available under: <https://www.finma.ch/FinmaArchiv/gwg/d/dokumentationen/publikationen/gwg_auslegung/pdf/59402.pdf>; GwG Handkommentar-Wyss, art. 2 N 18.

⁴⁹ FINMA-Circular 2011/1, N 13 *et seqq.* and N 44 *et seqq.*

⁵⁰ Ordinance of the Swiss Financial Market Supervisory Authority on Combating Money Laundering and Terrorist Financing in the Financial Sector dated 3 June 2015, SR 955.033.0.

⁴⁵ FINMA-Circular 2011/1, N 63 *et seqq.*

⁴⁶ FINMA-Circular 2011/1, N 67 *et seq.*

As a general matter, even if a payment service provider is not subject to AML regulation, the prohibition of money laundering of the Swiss Criminal Code⁵¹ remains applicable.

4.3 Cross-Border Aspects

Similarly to the situation under banking regulation, the Swiss inbound cross-border regime with regard to financial intermediation services is relatively liberal. As a general principle, an operator domiciled and located outside of Switzerland that provides services that might in principle be relevant from the perspective of Swiss AML regulation (e.g., payment services as outlined above) from abroad into Switzerland on a pure cross-border basis is exempt.

The AMLO⁵² provides that Swiss AML regulation applies to financial intermediaries that are active, on a professional basis, *in or from* Switzerland (art. 2 para. 1 AMLO, *cf.* art. 2 para. 3 AMLA and the financial thresholds of a professional activity outlined in section II.4.1 above). It thereby refers to the concept of a physical presence. According to the FINMA-Circular 2011/1, relevant activities are considered to take place in or from Switzerland if a financial intermediary:⁵³

- (a) has its domicile in Switzerland or is registered in a commercial register in Switzerland (including formal branch offices), or
- (b) employs individuals who permanently and in a professional capacity, in or from Switzerland, carry out or conclude financial intermediation transactions on behalf of the foreign intermediary or who can legally bind it with respect to such transactions (so-called *de facto* branch office).

The circular goes on to include also constellations where persons in Switzerland assist the foreign financial intermediary on a permanent basis with significant parts of its financial intermediation activities, e.g., by accepting or passing on financial assets (also considered a form of *de facto* branch office). This includes *inter alia* foreign money transmitters using a network of agents in Switzerland for the collection or payout of funds on their behalf.⁵⁴ In such case, the agents as auxiliaries have to comply with Swiss AML regulation and obtain an appropriate FINMA DSFI-license or SRO membership. However, if

a foreign operator has representatives in Switzerland that can legally bind it, it must itself obtain a license or membership, requiring it to register a formal branch office in Switzerland.⁵⁵

While the FINMA-Circular 2011/1 is illustrative, a certain ambiguity remains with regard to the level of activities in Switzerland required to amount to a *de facto* branch office of a foreign financial intermediary. At the same time, in relation to electronic payment services, the circular explicitly excludes from the territorial scope of application the offering of financial intermediation services into Switzerland if it is conducted exclusively via the Internet or other electronic channels.⁵⁶ In practice, however, cross-border electronic payments often require certain local services that have to be reviewed under the *de facto* branch concept outlined above.

For *per se* financial intermediaries (i.e., institutions subject to prudential supervision as listed in art. 2 para. 2 AMLA), the provisions on the territorial scope of application of the relevant industry-specific regulation (e.g., in the case of a bank, the BankA) apply.

5. Consumer Credit Regulation

5.1 Scope of Application of the CCA

The CCA stipulates certain rules and limitations for the granting of loans to consumers. Persons who, on a professional basis, grant consumer loans or engage in intermediation activities relating to consumer loans require an authorization (art. 1 para. 1 in conjunction with art. 39 CCA). Consumer loan agreements are subject to form and content requirements as well as to a maximum interest rate (currently 10 % p.a. and 12 % p.a. for credit card debt). A loan qualifies as consumer loan within the meaning of the CCA if it is granted to individuals for purposes other than business or commercial activities⁵⁷ and if the lender acts on a professional basis, i.e. if its lending activity is long-term and organized with the goal to achieve a profit⁵⁸ (art. 1 in conjunction with arts. 2 and 3 CCA).

The CCA also applies to credit cards and customer cards with credit options (art. 1 para. 2 lit. b CCA) and may in addition be relevant for other post-paid payment instruments and debit instruments with overdraft facilities.⁵⁹

⁵¹ Swiss Criminal Code of 21 December 1937, SR 311.0.

⁵² The rules on the territorial scope of application of Swiss AML regulation for financial intermediaries that are not subject to prudential supervision were recently amended with the introduction of the AMLO (which replaced the Ordinance on the Professional Practice of Financial Intermediation with effect from 1 January 2016) and a subsequent partial revision of the FINMA-Circular 2011/1, which entered into force on 1 January 2017 with the intention to codify the existing FINMA practice.

⁵³ FINMA-Circular 2011/1, N 28.1 *et seqq.*

⁵⁴ FINMA-Circular 2011/1, N 28.4.

⁵⁵ FINMA, Consultation Report on the partial Amendments to the FINMA-Circular 2011/1 dated 5 December 2016, 8, available under: <<https://www.finma.ch/de/~media/finma/dokumente/dokumentencenter/anhoerungen/laufende-anhoerungen/rs-finanzintermediaer/eb-finanzintermediaer.pdf?la=de>>.

⁵⁶ FINMA-Circular 2011/1, N 28.6.

⁵⁷ CHK-A. BRUNNER KKG, art. 1–42 N 27.

⁵⁸ CHK-A. BRUNNER KKG, art. 1–42 N 22.

⁵⁹ STEFAN BREITENSTEIN/PHILIPP JERMANN, M-payments multi-jurisdictional survey: Switzerland, Newsletter Banking Law, vol. 16 no. 1, 59.

5.2 Exemptions Available to Payment Service Providers

Certain types of loans are exempted from the scope of the CCA, allowing for certain structuring options if a payment service business model includes a credit element.

In particular, the CCA does *not* apply to:

- secured loans (art. 7 para. 1 lit. a and b CCA);
- loans that are granted without any interest and charges, either outright or subject to repayment in full in a single instalment (art. 7 para. 1 lit. c and d CCA);
- loans that are granted in amounts of less than CHF 500 or more than CHF 80,000 (*cf.* art. 7 para. 1 lit. e CCA);
- loans that must be repaid within three months (*cf.* art. 7 para. 1 lit. f CCA).

5.3 Cross-Border Aspects

Professional lenders domiciled outside of Switzerland can fall within the territorial scope of the CCA if they lend to Swiss domiciled consumers. If such foreign lender intends to obtain a license in Switzerland for consumer credit activities, the request must be filed with the competent authorities of the canton in which it anticipates being predominantly active. The license itself is valid for the entire territory of Switzerland (art. 39 para. 2 CCA).

6. Outlook: Proposed New Regulation in the Context of FinTech

In September 2015, MARK BRANSON, Chief Executive Officer of FINMA, stated in a speech that FINMA encourages and supports innovation and competitiveness in the Swiss financial marketplace while also taking into account new types of risks arising from technological change. In order to create a level playing field for all market participants, FINMA promotes technology-neutral, principle-based regulation and has recently been adapting its ordinances and circulars in this vein.⁶⁰ In his speech, BRANSON further proposed to introduce new regulation to enable financial innovators to build up their businesses in Switzerland without, for example, requiring an expensive and onerous banking license straightaway.⁶¹ FINMA as financial regulator expressed

its support for such new regulation in a press release in March 2016.⁶²

Following an assessment of the need for regulatory action in the FinTech area by the Federal Department of Finance («FDF»)⁶³, the Swiss Federal Council announced on 2 November 2016 its intention to ease the regulatory framework for providers of innovative financial technologies and instructed the FDF to prepare draft legislation⁶⁴. On 1 February 2017, the Swiss Federal Council published a consultation draft of certain proposed amendments to the BankA and the BankO and initiated a public consultation process.⁶⁵

The proposed changes rest on three pillars:

- (1) *Specific regulatory amendments*: The focus in this area lies on formalizing and extending the maximum period during which third party monies can be held in settlement accounts without qualifying as deposits from the public within the meaning of banking regulation (*see* section II.3.2 above). It is envisaged to extend this maximum holding period from currently 7 days (unwritten FINMA practice) to 60 days by amending the BankO (*cf.* art. 5 para. 3 lit. c of the consultation draft of the Banking Ordinance⁶⁶; «Draft BankO»)⁶⁷. The settlement accounts will however still be required to be non-interest bearing. The current proposal does not apply to settlement accounts of securities dealers (*cf.* art. 5 para. 3 lit. c no. 2 Draft BankO), but otherwise it appears that the eased regulation will be available for all operators whose business model requires them to hold client funds on settlement accounts for a certain period of time and who would like to do so without obtaining a banking license.⁶⁸ This change will especially be advantageous for crowdfunding businesses, but also for payment service providers as further discussed in the practical examples below.⁶⁹

⁶² Press release by FINMA dated 17 March 2016 (FN 1).

⁶³ *Cf.* Press release by the Swiss Federal Council dated 20 April 2016 (FN 31).

⁶⁴ Press release by the Swiss Federal Council dated 2 November 2016 (FN 1). The establishment of a less stringent regulatory framework for financial innovators is also supported by an advisory board appointed by the Swiss Federal Council and charged with assessing the future challenges and prospects for the financial center from a strategic viewpoint (*cf.* press release by the Swiss Federal Council dated 25 January 2017, available under: <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-65386.html>>).

⁶⁵ Press release by the Swiss Federal Council dated 1 February 2017 (FN 1).

⁶⁶ Available under: <<https://www.news.admin.ch/newsd/message/attachments/47040.pdf>>.

⁶⁷ FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 2.

⁶⁸ *Cf.* FEDERAL DEPARTMENT OF FINANCE, Basic Information Document dated 2 November 2016, Verringerung von Markteintrittshürden für Fintech-Unternehmen, 3, available under: <<https://www.news.admin.ch/newsd/message/attachments/45936.pdf>>.

⁶⁹ PATRICK GRAF/BENJAMIN MAYER, Fintech in der Schweiz – eine Würdigung der bundesrätlichen Regulierungsvorschläge, GesKR 4|2016, 470 *et seq.*, 472.

⁶⁰ *Cf.* BRANSON (FN 1), 1 *et seq.*; *cf.* also press release by FINMA dated 1 July 2016, available under: <<https://www.finma.ch/en/news/2016/07/20160701-mm-rs-09-01/>>; press release by FINMA dated 17 March 2016 (FN 1). In a speech given at the Deutsche Bundesbank G20 conference, the Bank of England Governor, MARK CARNEY, issued a warning regarding systemic risks arising from FinTech (newsletter article dated 26 January 2017: <<http://www.finews.asia/finance/23809-fintech-innovation-bank-of-england-mark-carney-ravi-menon>>).

⁶¹ *Cf.* BRANSON (FN 1), 4.

- (2) *Creation of a largely unregulated innovation space (sandbox)*: It is further proposed to amend the BankO to ease the threshold of a professional deposit-taking activity and thereby create a more liberal (but still limited) space, or so-called sandbox⁷⁰, for FinTech operators (or other interested businesses) to test their business model before becoming required to obtain a banking license or the new FinTech license (see below)⁷¹. The innovation sandbox will allow operators to accept deposits from the public in an amount of up to CHF 1 million without triggering a prudential license requirement (cf. art. 6 para. 2 lit. a Draft BankO). As long as an operator stays below this threshold, it is not considered to be active on a professional basis, irrespective of the actual number of deposits and irrespective of whether deposits are publicly solicited. As mitigating measures, it is proposed that (a) the deposits must not bear interest and may not otherwise be invested if the operator is active in the financial sector, and (b) the operator must inform its customers that it is not supervised by FINMA and that the deposits are not subject to the Swiss depositor protection scheme (cf. art. 6 para. 2 lit. b and c Draft BankO).
- (3) *New license type aimed at financial innovators*: To facilitate the step-up from an unregulated activity to a prudentially regulated status, it is proposed to amend the BankA to create a new license type for FinTech firms and other businesses that have a need to accept deposits from the public but do not engage in the traditional banking business of maturity transformation (*Fristentransformation*). The new license will allow the acceptance of deposits from the public up to a maximum of CHF 100 million with the limitations that no interest must be paid on such deposits and the operators will not be allowed to invest the funds received from the depositors (cf. art. 1b para. 1 of the consultation draft of the Banking Act; «Draft BankA»). Higher maximum deposit amounts can be allowed on a case-by-case basis if customer protection remains ensured (cf. art. 1b para. 4 Draft BankA). Holders of the proposed FinTech license will profit from less burdensome requirements with respect to financial reporting and audits as well as, subject to implementing provisions that are yet to be developed, less invasive organizational, equity, capital adequacy and liquidity requirements.⁷² The deposits held with these undertakings will not be cov-

ered by the Swiss depositor protection system, a fact that the customers will have to be informed about (cf. art. 1b para. 3 Draft BankA). The proposed regime may in particular be interesting for e-money issuers and crowdfunding platforms intending to hold client funds for a period exceeding 60 days, but can also be used by other business models.

The consultation process regarding the proposed amendments to the BankA and the BankO will last until 8 May 2017. Overall, the amendments might enter into force at the earliest in 2018, assuming the proposal is received positively by all stakeholders.

The new exemptions and reliefs do not extend to AML regulations⁷³ nor to the consumer credit regime, both of which are not considered specific market-entry barriers for financial innovators.⁷⁴

III. Practical Examples

1. General Remarks

Payment methods take different forms such as payment by (electronic) bank transfer, payment by credit card, or web-based and mobile payments.⁷⁵ These can be used in physical retail, for payments on e-commerce sites (both P2B) and for P2P payments. In terms of funding, payment systems and instruments can operate on a prepaid, «instant» or postpaid/credit basis. There are payment service providers in the market that target mainly the recipient side of P2B payments, *i.e.* merchants and marketplaces, while others focus on the side of the payor/customer or on the provision of an integrated system. The following is a selection of practical examples of payment systems that are offered in the Swiss market along with an assessment of their regulatory treatment *de lege lata* and, with regard to the upcoming new FinTech regulation, *de lege ferenda*.

2. Traditional Cash Payments and Bank Transfers

There are a number of payment methods that have been established well before the ongoing electronic transformation of the market and which are still in widespread use. Among these are in particular payments by cash,

⁷⁰ In the Asia-Pacific region, Singapore, Hong Kong, Malaysia and Australia have established sandboxes (newsletter article dated 26 January 2017: <<http://www.fineews.asia/finance/23809-fintech-innovation-bank-of-england-mark-carney-ravi-menon>>). A sandbox has also been established in Great Britain and is being considered in the United States of America (cf. FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 28 *et seqq.*).

⁷¹ GRAF/MAYER (FN 69), 473.

⁷² FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 20.

⁷³ Press release by the Swiss Federal Council dated 2 November 2016 (FN 1).

⁷⁴ Cf. FEDERAL DEPARTMENT OF FINANCE, Basic Information Document (FN 68), 2.

⁷⁵ Cf. ROLF H. WEBER, Überblick über die rechtlichen Rahmenbedingungen für webbasierte und mobile Zahlungssysteme, in: Weber/Thouvenin (eds.), Rechtliche Herausforderungen durch webbasierte und mobile Zahlungssysteme, 5 *et seqq.*, 8 *et seq.*

payments by bank (wire) transfer, payments by direct debit (*Lastschrift*), payments by credit card and payments by debit card.

Payment by cash is the most traditional payment method. Apart from the Swiss Confederation and the SNB as issuers of the coins and banknotes used, it involves in principle only the payor and the recipient, *i.e.* no payment service provider participates in the transaction. It is also essentially the only payment method among private persons that uses Swiss legal tender within the meaning of the Currency and Payments Act⁷⁶ («CPIA») and as referred to in the Code of Obligations⁷⁷ («CO»).⁷⁸

A simple payment by *bank transfer* usually consists in the recipient providing the payor with his or her bank details (account number or IBAN and bank identifier). The payor then initiates a payment by instructing his bank to pay a certain amount to the recipient and, at the same time, to debit the payor's bank account.⁷⁹ This is implemented by a cashless transfer of book money⁸⁰ via internal account transfers or interbank payments. A payment by *direct debit* is basically a bank transfer which is triggered by the recipient on the basis of a debit authorization by the payor to his bank.⁸¹ Bank transfer payments are based on book money, which is essentially a claim of the customer against the bank, and on payment instructions (*Anweisung*; art. 466 *et seqq.* CO). Because book money is not legal tender, its acceptance as payment is subject to an (explicit or tacit) agreement between the parties to the transaction.

The classic payment methods are strongly connected to the traditional banking system. However, there are electronic payment and acceptance services that are operated by separate payment service providers and that build on the classic bank transfer (*see* section III.6 below). Similarly, credit and debit card systems are often used as a basis for electronic payment services and are therefore discussed separately below (*see* sections III.3 and III.4 below).

⁷⁶ Federal Act on Currency and Payment Instruments of 22 December 1999, SR 941.10.

⁷⁷ Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, SR 220.

⁷⁸ Art. 2 CPIA; art. 84 para. 1 CO; the only other form of legal tender in Switzerland are Swiss franc sight deposits (*Sichtguthaben*) with the SNB.

⁷⁹ URS EMCH/HUGO RENZ/RETO ARPAGAU, *Das Schweizerische Bankgeschäft*, 7th edition, Zurich/Basel/Geneva 2011, N 2541.

⁸⁰ The popular initiative «For crisis-resistant money: end fractional-reserve banking (*Vollgeld-Initiative*)» is calling for a complete transformation of the current monetary system. With the proposed new art. 99 of the Federal Constitution, the SNB would obtain a monopoly for the issuance of book money. The commercial banks would no longer be able to grant loans financed by sight deposits (current accounts) as they presently do (press release by the Federal Council dated 9 September 2016, available under: <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64444.html>>).

⁸¹ Cf. EMCH/RENTZ/ARPAGAU (FN 79), N 2545.

3. Credit and Debit Card Payments

3.1 Description

Credit card payment schemes (*e.g.*, Visa, Mastercard or American Express) usually involve four, in some cases only three parties:

- (1) the cardholder wishing to make a payment;
- (2) the merchant accepting the credit card as means of payment;
- (3) the issuer maintaining the relationships with the cardholders; and
- (4) the acquirer maintaining the relationships with the merchants (or, for certain card types, a combined issuer/acquirer).⁸²

The credit card networks usually grant licenses to one or several national issuers (in Switzerland, *e.g.*, banks such as UBS, Credit Suisse or Cornèr Bank) and acquirers (in Switzerland, *e.g.*, Swisscard AECS, Aduno or SIX Payment Services).⁸³ In addition, there may be processing agents and other service providers to each of the parties in the credit card scheme (*see* further section III.4 below).

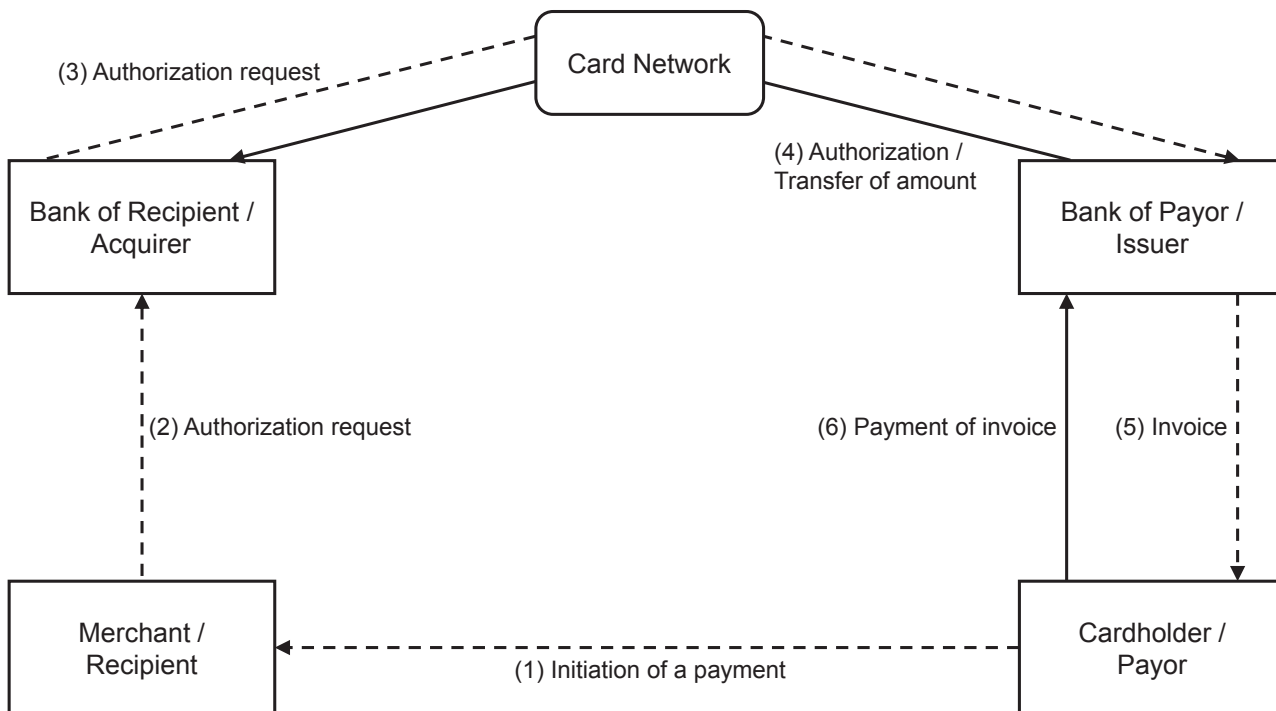
In a typical credit card payment transaction, the cardholder initiates the payment by scanning or manually entering his or her credit card data into a terminal or online interface of the merchant and confirming with certain additional data such as a personal identification number (PIN) and/or other security mechanisms or identification procedures such as an additional password (*e.g.* Verified by Visa, MasterCard SecureCode) or transaction authentication number (TAN). The data is then passed on by the acquirer through the card network to the issuer for authorization.⁸⁴ Upon authorization, payment is made by the issuing bank (against the credit of the cardholder) to the acquirer through the card network, subject to so-called interchange fees for the benefit of the issuer as well as fees for the network, and then passed on by the acquirer to the merchant net of the latter's processing fees. The cardholder is invoiced by the issuing bank for accrued payments made at the end of a specified period, usually on a monthly cycle («*pay later*»).⁸⁵ In addition, cardholders can usually enter into an agreement with the issuer to be granted credit beyond the due date of the monthly payments, in which case usually only a certain minimal amount becomes due each month and interest is charged on the outstanding amount following the due date (partial payment option). The following simplified chart outlines a typical credit card payment transaction:

⁸² Cf. GwG Handkommentar-Wyss, art. 2 N 18.

⁸³ Cf. GwG Handkommentar-Wyss, art. 2 N 18.

⁸⁴ Cf. ERNST STAHL/GEORG WITTMANN/THOMAS KRABICHLER/MARKUS BREITSCHAFT, *E-Commerce Leitfaden*, Noch erfolgreicher im elektronischen Handel, 3rd edition, Regensburg 2015, 4–4, 4–13, available under: <https://www.six-payment-services.com/dam/downloads/e-commerce_guideline_de.pdf>.

⁸⁵ Cf. EMCH/RENTZ/ARPAGAU (FN 79), N 2534.



Debit card payment schemes such as Maestro are not dissimilar from credit card schemes except for the fact that the amounts paid are immediately debited from the bank account of the cardholder (usually with the issuer) and credited to the bank account of the merchant. In contrast to a payment by credit card (and unless the debit account can be overdrawn), no credit is granted («pay now»).

3.2 Regulatory Assessment

a. BankA

Offering services in connection with credit or debit cards in any capacity is not *per se* a banking activity within the meaning of the BankA. However, the processing of card payments usually involves the funds passing through several accounts maintained by the parties involved in the card scheme.⁸⁷ In principle, upon the release of the payment by the issuer, apart from the fees that are deducted in the course of the transaction, the funds economically belong to the merchant, meaning that the accounts through which the money passes are essentially client money accounts held, e.g., by the acquirer or any of its processing agents in their own name but for the benefit of the merchant. The merchants are thus exposed to the default risk of these parties in the credit card scheme until the time of final settlement onto the merchant’s business account. Absent an applicable exemption, the liabilities towards the next party in the payment

chain and ultimately towards the merchant constitute deposits from the public within the meaning of banking regulation and may therefore trigger a banking license requirement.

As explained in section II.3.2 above, the exemption from the qualification as deposits for funds that constitute a compensation for goods and services or a security (art. 5 para. 3 lit. a BankO) does not apply to third party service providers that are not the beneficiaries of such funds, but merely charged with passing them on towards the merchant. Card payments may, however, be structured to make use of the exemption for settlement accounts (art. 5 para. 3 lit. c BankO). For that, it must be ensured that the client accounts of the parties involved in the payment are separate, non-interest bearing accounts with the sole purpose of settling card transactions for the benefit of the cardholder. In case of credit card payments, the required settlement purpose should usually not present an issue because the main transaction (e.g., a purchase of goods or services by credit card) has already been concluded. Under the current FINMA practice, funds may be held on settlement accounts for a maximum of 7 days without qualifying as deposits. It must therefore be ensured that the payment is forwarded, ultimately to the merchant, within this timeframe. Assuming the new Swiss FinTech regulation is implemented as proposed, this maximum holding period will be extended to 60 days, allowing, e.g., to collect a certain batch of payments before forwarding the aggregate amount to the merchant.

If the card payments and client money accounts are structured as outlined above, the payment-handling service providers in a credit card transaction are not considered

⁸⁶ Cf. EMCH/RENZ/ARPAGAU (FN 79), N 2527.
⁸⁷ STEFAN KRAMER, in: Zobl/Schwob/Winzeler/Weber/Kaufmann/Kramer (eds.), Kommentar zum Bundesgesetz über die Banken und Sparkassen, Zurich 2015, art. 1^{bis} BankA N 23.

to be accepting deposits from the public and therefore no banking license is required for such activity. If this type of structure is not possible or desired, e.g., if a service provider on the acquirer side wishes to collect and hold funds on behalf of a merchant for a period exceeding 7 days, it might still be considered to structure the business model so as to render such service into Switzerland on a pure cross-border basis from abroad or to have the deposits guaranteed by a bank. That said, in practice, credit card issuers (and in some cases also acquirers) are often regulated banks and as such are allowed to accept deposits from the public should there be a need in connection with payment services. The proposed new FinTech regulation will also offer the option for service providers to obtain the «light» FinTech license and gain more flexibility in handling client funds or operate within the limitations of the sandbox, subject to disclosure duties regarding the absence of depositor protection (and, in the case of the sandbox, the absence of regulatory oversight).

b. AMLA

According to FINMA practice as set out in the FINMA-Circular 2011/1, in a typical credit card (or other payment card) set-up involving four parties or more, only the service provider giving the cardholder access to the system and having direct cardholder contact, i.e. usually the issuer of the card licensed by the credit card organisation, or such organisation itself, is subject to Swiss AML regulation if it is located in or has a relevant physical presence in Switzerland. If the issuer is a Swiss bank, as is often the case, it is in any case subject to an AML supervision requirement by virtue of its regulatory status. The acquirer and related processing agents or payment service providers, being the parties maintaining and supporting the relationships with the merchants, are out of scope of Swiss AML regulation under the assumption that they do not engage in any other financial intermediation activities.⁸⁸ The reason for this is that the risk of money laundering in connection with the use of a credit card is primarily seen on the side of the cardholders. Furthermore, the issuer often also grants credit to the cardholders, which is also an activity subject to Swiss AML regulation. Customer credit card schemes including a credit facility or that can be used for payments with parties other than the issuer itself are treated similarly to credit card systems for AML purposes.⁸⁹

In principle, the above also applies to debit cards (with the exception of the credit aspect). The issuers here are usually regulated banks, because they also maintain the customer accounts which are debited in connection with card transactions (see section III.3.1 above).⁹⁰ In such

case, no (additional) AML DSFI-license or SRO registration for AML purposes is required.

c. CCA

Unless one of the exemptions set forth in art. 7 CCA applies (see section III.5.2 above), the issuance of credit cards with a partial payment option and the offering of overdraft facilities in connection with debit cards are governed by the rules of the CCA if the cardholder/customer falls under the consumer definition of the CCA (i.e., he or she uses the card for personal purposes) and the issuer acts on a commercial basis (which will usually be the case) (art. 1 para. 2 lit. b CCA). The relevant contractual arrangements have to be concluded in writing in accordance with the pertinent provisions of the CCA (art. 8 para. 2 CCA). The issuer granting credit must obtain an authorization by the competent cantonal authority unless it is already regulated as a bank (art. 39 para. 3 lit. a CCA).

Credit cards without a partial payment option do not fall under the CCA, provided that the amounts accrued over a monthly billing period are not subject to interest or must be paid back within a relatively short period upon receipt of the monthly invoice, but in no event more than 3 months (art. 7 para. 1 lit. c and f CCA).

4. Credit and Debit Card Based Electronic and Mobile Payment Systems

4.1 Description

Many electronic payment systems such as Apple Pay, PayPal, Twint/Paymit, Android Pay or Samsung Pay⁹¹ are at least partially based on classic credit or debit card payment schemes (see section III.3 above), adding technology to facilitate payments at the point of sale, in the context of e-commerce, or in some cases between individuals (P2P). Furthermore, there are gateway services focusing on enabling merchants to accept various means of payment including credit or debit cards (e.g., Stripe or again PayPal).

These types of payment systems are integrated into mobile apps or browser-based solutions that facilitate the authentication process at the point of sale or within online shopping sites, marketplaces or other applications. App-based mobile solutions usually require the payor to add his or her credit card information into the app on his mobile phone, storing it securely within a previously established user account. In order to make a payment, the payor uses his mobile phone with a terminal equipped with Near Field Communication («NFC») or scans in a quick response («QR») code with the device

⁸⁸ Cf. FINMA-Circular 2011/1, N 67; cf. also GwG Handkommentar-Wyss, art. 2 N 18.

⁸⁹ GwG Handkommentar-Wyss, art. 2 N 18.

⁹⁰ GwG Handkommentar-Wyss, art. 2 N 18.

⁹¹ Android Pay and Samsung Pay are not (yet) available in Switzerland.

camera and confirms the transaction, thereby triggering payment. The service providers offering these solutions contract with various issuers to enable their cards to be used in the app. If special infrastructure is required at the point of sale, the service providers work with the acquirers to enable the acceptance of the payment product. For browser-based solutions, service providers may offer application programming interfaces («API») to integrate payment acceptance solutions into websites and market platforms. In terms of the actual payments, some service providers offer processing services to route the funds to the recipients or merchants, while others rely on third party processing agents.

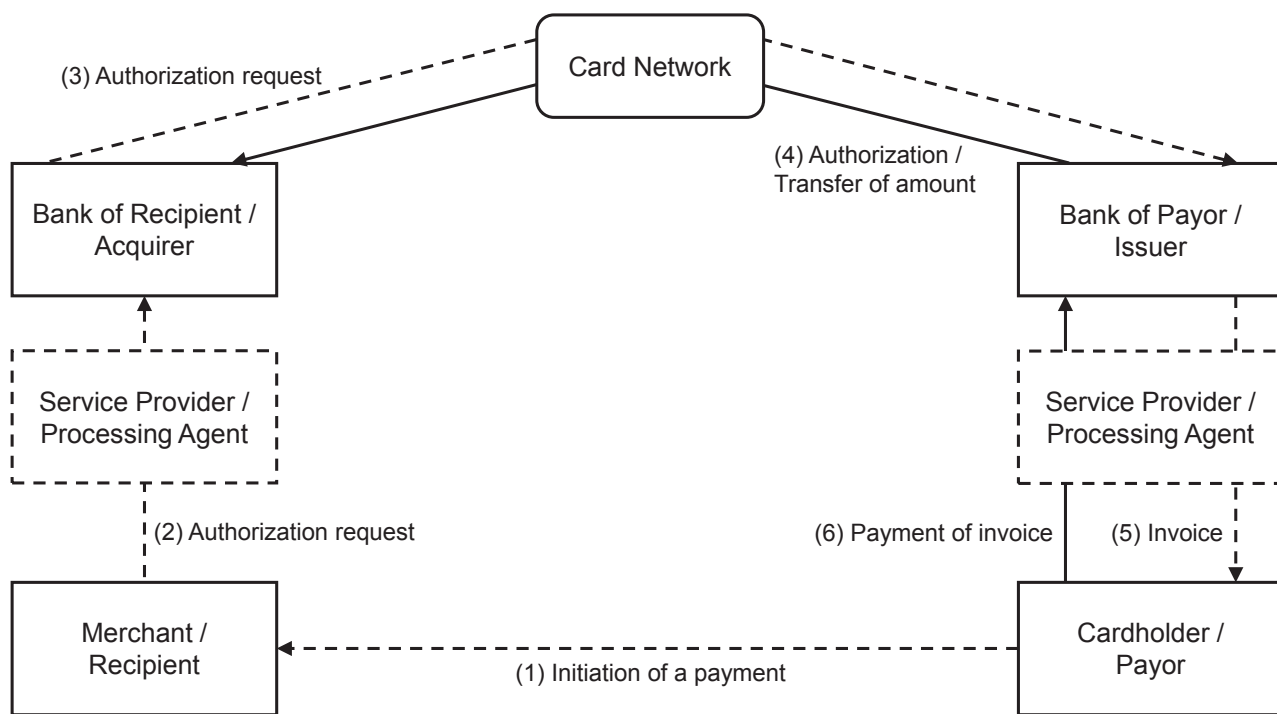
It is difficult to summarize the multitude of electronic and mobile payment systems available in the market in general terms. However, to the extent such systems refer to straight-through card payments without any (interim) e-money balance held with a payment service provider, the payments as such are similar to traditional credit and debit card payments. The main difference is the addition of processing agents and other types of service providers that take over parts of the authorization and fund remittance processes, against a fee, both on the issuer and on the acquirer side of a payment transaction. *Inter alia*, this has the purpose of facilitating or bolstering the security⁹² of retail payment processes at the point of sale. The following is a heavily simplified schematic of the involved parties:

In addition to credit and debit card based payments, some payment apps (e.g., Twint/Paymit) can 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, *i.e.*, the payor allows the payment service provider to deduct the amount from the payor’s bank account and to transfer a corresponding amount to the recipient’s bank account (often routed via a bank account of the payment service provider, subject to a fee). These systems are often bank-operated or bank-sponsored and may therefore be less constrained in regulatory matters.

4.2 Regulatory Assessment

a. BankA

From the perspective of banking regulation, electronic and mobile payment systems based on traditional credit and debit card schemes basically present the same issues as the card schemes they are based on (see section III.3.2a above). This means that the client money accounts of any processing agents or other service providers that are involved in the flow of funds must be structured as settlement accounts in the meaning of art. 5 para. 3 lit. c BankO in order to avoid a qualification as deposit-taking from the public and a potential banking license requirement for such service providers (to the extent they are not already licensed as banks). Other options are a



⁹² E.g., with Apple Pay, the customer’s payment card information is not shared with the merchant, but replaced with an authentication method using dynamic security codes.

default guarantee for such accounts granted by a Swiss bank or structuring the service provider’s activity as purely cross-border from abroad into Switzerland. The

proposed new FinTech regulation will offer more flexibility, e.g., by extending the maximum holding period for funds in settlement accounts to 60 days, as further discussed in section II.6 above.

Where payment solutions can be linked to traditional bank accounts, these have to be maintained by regulated banks that are authorized to hold deposits (for any interim accounts that payments are routed through *see* section III.3.2a above).

b. AMLA

The structure of electronic and mobile payment systems being similar to traditional credit or debit card systems but with the addition of various processing agents and service providers, the question arises as to how such additional parties must be treated from the point of view of AML regulation. The current FINMA-Circular 2011/1 does not address this matter. An older, more detailed publication by the Anti-Money Laundering Control Authority («AMLCA»), a predecessor authority of FINMA, discusses the regulatory treatment of third party processors charged with administrative, technical and operational functions in the context of the credit card business.⁹³

According to the so-called AMLCA Compilation on applicability, which discusses the personal and geographic scope of application of the AMLA in the non-banking sector, third party processors charged by the issuers with certain tasks in connection with the credit card business are *not* subject to a separate authorization requirement (i.e., a license as DSFI or a registration with an SRO for AML purposes) if the issuer itself is already authorized as a financial intermediary. In our view, this approach is sensible, as money laundering prevention is maintained. There are no indications that FINMA has changed this practice established by the AMLCA. Processors on the acquirer side of the business are in our view also not subject to an authorization requirement under the AMLA for the reason that the acquirers themselves are not, provided that the tasks of the relevant processor do not go beyond the acquirer's typical function in the scheme.

Where a payment system involves linked bank accounts, it would in our view have to be explored on a case-by-case basis whether any of the service providers are granted a power of attorney to dispose over third party funds and might on this basis qualify as financial intermediaries subject to the AMLA.

c. CCA

To the extent any of the additional service providers in an electronic or mobile payment system are involved in

the granting of credit to cardholders, *see* section III.3.2c above.

5. Payments Based on E-Money

5.1 Description

E-money, though not a legally defined term in Switzerland⁹⁴, can be understood as a monetary value referring to a national currency that is registered and stored in electronic form, e.g., on a chip card, a mobile app or other piece of computer software («*pre-paid*»). An e-money balance essentially represents a claim in a corresponding amount against the operator of the relevant payment system or the issuer of the relevant payment instrument. Like book money created by commercial banks, e-money does not qualify as legal tender in Switzerland (and can therefore in principle be issued outside of the state monopoly for banknotes and coins pursuant to art. 99 para. 1 of the Federal Constitution).⁹⁵ Merchants and other payment recipients that participate in the relevant payment systems implicitly agree to accept it as payment⁹⁶. E-money can be used in P2B and P2P payments.

Similarly to electronic and mobile payment systems on the basis of credit or debit card schemes, e-money can be integrated into mobile apps or browser-based solutions (such as those offered, e.g., by PayPal and Twint/Paymit). This allows the user to store a balance for future payments in his or her previously established user account that serves as a digital wallet.⁹⁷ The balance can be funded by various means, including credit or debit card payments, bank transfers or pre-paid cards or codes. Funds paid in by the users of an e-money based system are usually held by the operator of the system in pooled client money accounts in its own name for the benefit of the users.

The user experience in making an e-money payment is usually similar to that of making a payment on the basis of a credit or debit card or linked bank account. Payments can be made at the point of sale or between individuals using a mobile phone app or online using a web inter-

⁹³ Cf. Anti-Money Laundering Control Authority, Compilation on applicability (FN 48), N 212 *et seq.*

⁹⁴ Art. 2 para. 2 EMD defines electronic money as «electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of [the PSD] and which is accepted by a natural or legal person other than the electronic money issuer».

⁹⁵ BREITENSTEIN/JERMANN (FN 59), 62; cf. *inter alia* also BÄRTSCHI/MEISSER (FN 18), 117; MARTIN HESS/ALEXANDRA WEISS VOIGT, E-money, e- and m-payments according to Swiss law, CLEARIT 58, March 2014, 8 *et seq.*, 8, available under: <<http://www.wenger.vieli.ch/getattachment/2f693330-32d9-4f05-ba91-78cf7abc2f74/E-Geld,-E-und-M-Payments-gemass-Schweizer-Recht.aspx>>, 8.

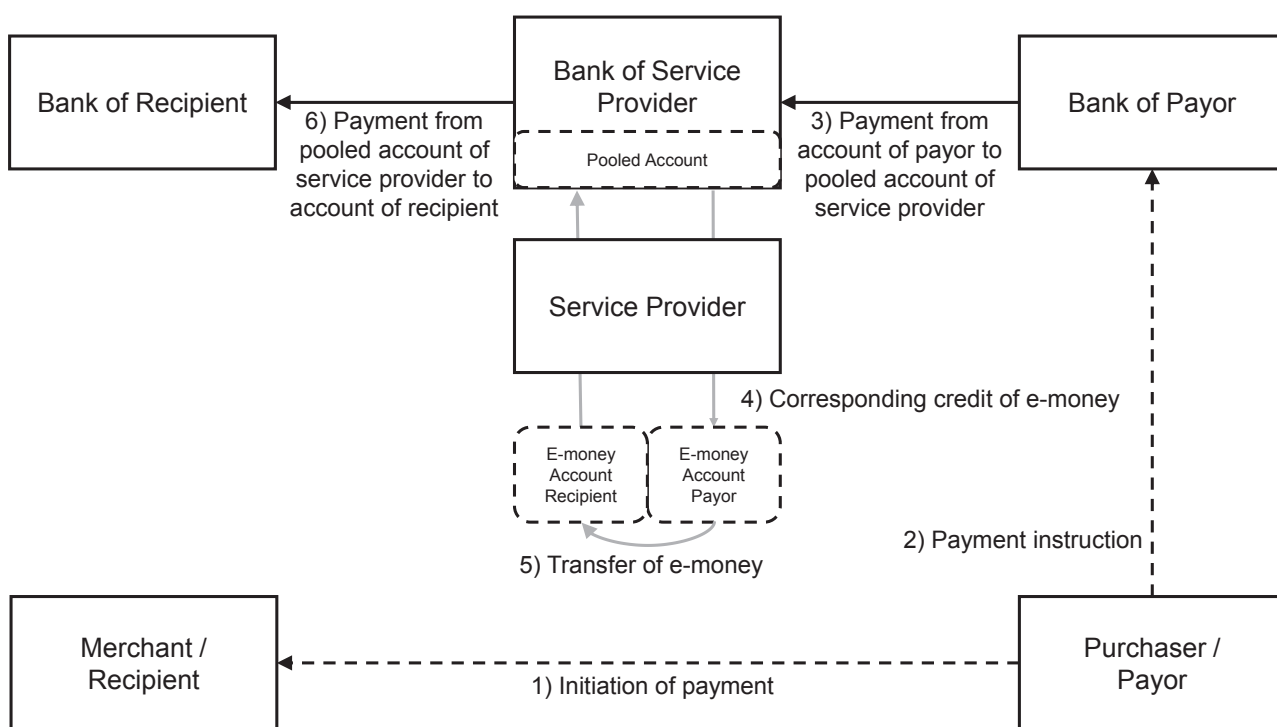
⁹⁶ Cf. Report of the Swiss Federal Council on Virtual Currencies in Response to the Postulates Schwaab (13.3687) and Weibel (13.4070), 7, available under: <<http://www.news.admin.ch/NSBSubscriber/message/attachments/35361.pdf>>.

⁹⁷ Cf. STAHL/WITTMANN/KRABICHLER/BREITSCHAFT (FN 84), 4–15.

face. Once the payor confirms the payment, the recipient immediately receives the amount in his e-money account with the payment service provider through a book-entry transfer of e-money, not dissimilar to a bank transfer.⁹⁸ Subsequently, the recipient usually has the option of converting the e-money into book money by having it transferred to a traditional bank account and then into legal tender by withdrawing cash from the bank. However, the balance can also be left on the e-money account to be used for future payments. The following simplified chart shows a possible form of an e-money system:

acceptance of which on a professional basis is subject to a banking license requirement.

According to a decision of the Swiss Federal Supreme Court, customer balances in a payment system, *prima facie*, do not have the same function as traditional bank deposits, as they are not intended to be invested with the promise of a return, but rather to be used as a cashless means of payment to acquire goods or services. The court considered that the defining criterion for a qualification of the balance as a deposit was whether a repayment obligation of the operator of the payment system in a corre-



5.2 Regulatory Assessment

a. BankA

While e-money is not legal tender, it has to be considered whether its issuance and/or the maintaining of e-money balances in user accounts may fall into the scope of the BankA.

By accepting a transfer of funds onto a previously established user account to be stored as an e-money balance and promising to make such balance available for future use as means of payment, the operator of an e-money system undertakes a liability towards the user.⁹⁹ In the absence of a pertinent exemption, liabilities towards customers generally qualify as deposits from the public, the

spending amount exists or not.¹⁰⁰ Referring to this decision, SCHÖNKNECHT discusses in a recent comprehensive publication on the topic whether only obligations to pay back to the depositor should qualify as deposits, or also those to pay onwards to third parties. Based on systematic, historical and teleological arguments, he comes to the conclusion that also obligations to pay to a third party fall within the scope of the BankA.¹⁰¹ Subject to the exemptions listed in the BankO, we share this view, also considering that e-money users are exposed to the default risk of the system operator and should be afforded protection under the BankA similar to bank depositors.

⁹⁸ Cf. HESS/WEISS VOIGT (FN 95), 8.

⁹⁹ Cf. decision of the Swiss Federal Supreme Court 2C_345/2015 (FN 4), consid. 4.2; cf. also MICHAEL KUNZ, Regulation of Electronic Banking in Switzerland, Zurich 2001, 18.

¹⁰⁰ Cf. decision of the Swiss Federal Supreme Court 2C_345/2015 (FN 4), consid. 7.4.2 *et seq.*

¹⁰¹ Cf. SCHÖNKNECHT (FN 30), 302 *et seqq.* However, SCHÖNKNECHT also states that monies that are transferred to a third party and only remain with the recipient for a short period of time should not be covered by the prohibition to accept deposits from the public (cf. SCHÖNKNECHT (FN 30), 315).

Where e-money balances can be held in a user account for an extended period of time, *i.e.* for longer than 7 days (or longer than the 60 days that are proposed in the draft FinTech regulation), as will often be the case in practice, the exemption for settlement accounts is not pertinent, even if the balance does not bear any interest and even if it could be argued that the purpose of the funds has been pre-determined in the sense that a main transaction to be settled has already been organized or is imminently foreseeable (which may prove difficult).

The exemption for payment instruments and payment systems pursuant to art. 5 para. 3 lit. e BankO may provide relief to operators of e-money systems, if only within relatively narrow limits. Under this provision, an e-money balance does not qualify as a deposit from the public if, cumulatively:

- (a) the use of the stored e-money balance is strictly limited to future purchases of goods and services. In particular, this means that the balance must not be available for P2P payments and a withdrawal of funds must be excluded (*i.e.*, the user must not be able to reduce his or her e-money balance by transferring funds to his or her own bank account or by drawing cash against the e-money balance);
- (b) the e-money balance stored with a particular provider never exceeds CHF 3,000 per customer. The payment service provider is expected to take reasonable measures to prevent users from exceeding such threshold, *e.g.*, by opening multiple accounts; and
- (c) the e-money balance does not bear any interest nor are there any other monetary incentives in relation to the e-money balance.

If the payment system cannot be structured in line with these principles, the e-money balances of customers qualify as deposits from the public, requiring the operator to obtain a banking license. Where e-money based payment systems are bank-operated or bank-sponsored (*e.g.*, Twint/Paymit), this regulatory requirement may not present substantial issues. However, for other payment service providers, this may prove an insurmountable market entry barrier. Such providers will likely opt to provide their service on a pure cross-border basis from abroad into Switzerland (*e.g.*, PayPal). Another option, which will in most cases not be economically viable, would be a Swiss bank guaranteeing the repayment obligation of the e-money operator towards the users. E-money systems are therefore also among the businesses that might profit from the proposed new FinTech regulation, which will allow them to obtain a less onerous FinTech license rather than a full banking license, or even operate in the innovation sandbox, at least in an early phase of the business.

b. AMLA and CCA

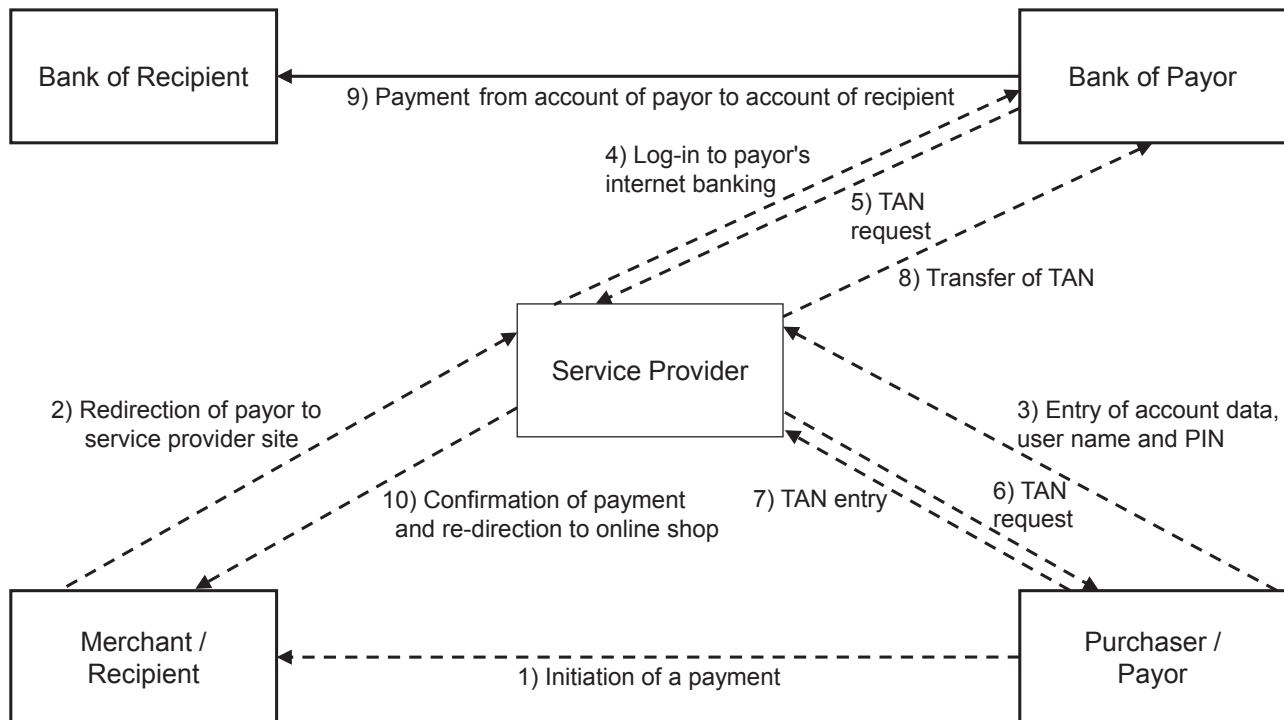
With regard to a regulatory assessment of e-money payment service providers under the AMLA and the CCA, *see* sections III.3.2b and III.3.2c above. It should be noted that e-money systems do not usually include a credit function or overdraft facility.

6. Payment by Direct Bank Transfer (Direktüberweisungsverfahren)

6.1 Description

Direct bank transfer systems, which allow to pay for goods and services in online shops using an existing e-banking relationship of the user (*e.g.*, SOFORT Banking or giro pay), take various forms. In one potential setup, the user wishing to make a purchase online chooses payment by direct bank transfer as payment method on an e-commerce site. Subsequently, the user is asked to enter online banking login data on the platform of the payment service provider, which can be integrated into the e-commerce site. The data is passed on to the bank along with the requested payment amount. The bank then generates a TAN which it communicates directly to the user, who enters it into the platform to confirm the payment. The TAN is again passed on to the bank, which proceeds to execute the payment. The payment service provider then sends a confirmation to the merchant.¹⁰² The following schematic shows the key steps in the process:

¹⁰² Cf. STAHL/WITTMANN/KRABICHLER/BREITSCHAFT (FN 84), 4–17; *cf.* also FEDERAL DEPARTMENT OF FINANCE, Explanatory Report (FN 6), 9.



6.2 Regulatory Assessment

a. BankA

The payment service provider offering direct bank transfer services is not involved in the flow of funds. No payments are passed through its accounts. Rather, the payment is made directly from the user's bank to the merchant's bank. Consequently, the activity of the payment service provider is out of scope of banking regulation.

b. AMLA

It may be debatable whether the payment service provider, in the set-up outlined above, is given power to dispose over third party assets because the banking information is relayed through its platform. However, because the TAN, which ultimately triggers the payment, is communicated separately and directly from the bank to the user, the payment service provider is at no point in a position to execute payments of its own accord. Consequently, the activity of the payment service provider is in our view also out of scope of AML regulation.

c. CCA

The payment service provider in a direct bank transfer set-up is not involved in any consumer credit business. Consequently, its activity is out of scope of consumer credit regulation. However, the CCA may apply in the relationship between the user and its bank to the extent payments trigger an overdraft.

IV. Summary

The landscape of payment systems, in Switzerland and globally, has changed tremendously in recent years, creating a multitude of options for both e-commerce and money transfers between individuals. That said, many of the innovations in payment systems are in some way dependent on more traditional instruments such as credit or debit cards and personal bank accounts. These are either used directly in the execution of an actual payment transaction or as a funding tool to create e-money for subsequent payments. Thus, innovation is rather focused on accessibility and convenience at the point of sale as well as enabling the acceptance of a broad range of payment instruments by small businesses and even individuals, including in the context of online marketplaces.

Because of these established structures and because most payments are still made in national or supranational currencies rather than cryptocurrencies without a central issuer, Swiss principle-based financial regulation has so far coped well with the innovations in the payments sector. However, as one moves towards e-money based payments, it becomes more difficult for payment service providers to be active on the Swiss market without a banking license, which is most cases impractical or economically not viable. The upcoming revisions to Swiss banking regulation in the context of FinTech, in particular the envisaged FinTech license bridging the gap between mere financial intermediaries and fully fledged banking operations, therefore hold substantial promise for payment service providers in the Swiss market.

One area that will likely not be addressed by the new regulation is the cross-border provision of payment services into Switzerland. While the inbound regulatory regime is traditionally liberal, the complexity of modern payment systems and the fact that many foreign regulatory license types in this area have no equivalent in Switzerland makes it difficult for would-be market entrants to gain certainty about the regulatory treatment of their services, in particular where they collaborate with local financial institutions or service providers. A straightforward and clearly communicated stance of the Swiss financial regulator also in this area is essential to the continued attractiveness of the Swiss marketplace.
