LOYENS & LOEFF

BANKING & FINANCE

FinTech 2020

Legal guide for Swiss practitioners

LOYENS & LOEFF

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Preface

Switzerland has acquired a privileged position for setting up and developing FinTech business models, including DLT-based services. As well-established, leading financial centre with an investor-friendly tax and legal environment, Switzerland has grown into an innovation hub for creating technology-based financial solutions[1]. This is also because the Swiss government and the legislator have responded rapidly to improve the legal and regulatory environment. Since 2017, several legal provisions have been established to allow FinTech business models to be developed within a technology-neutral environment, establishing measures commensurate with their size and risks, always considering public interests. If clients and the functioning of the financial markets are not protected, FinTech businesses have little chance of success in the long run.

In the second quarter of 2020, the world has become much faster a virtual world—with big and small businesses, as well as consumers, led by the COVID-19 pandemic to switch to online and digital solutions. In addition, alternatives to the traditional financial services industry are becoming increasingly relevant, inter alia due to cost sensitivity. Governments realise the potential of technology and support research and development to ensure future productivity. While new opportunities arise for developing FinTech projects, financial support required to achieve profitability has been affected by the liquidity shortage.

Clearly, the development of more efficient, digital, online and automated solutions will be the sole way to overcome the current circumstances, added to the low interest rates and increasingly stringent regulation that put additional pressure on costs. It is our intention to support the FinTech industry and publish an overview of the Swiss legal framework for FinTech businesses. The overview shall contribute as a guide for FinTech businesses to preliminary identify legal aspects and use them to shape their projects. This edition looks at the various legal and regulatory questions that may be of relevance to FinTech companies in Switzerland. It includes the latest developments regarding **open banking**, the draft **DLT law** and the legal treatment of **tokens** and **stable coins**, the relevant legal aspects of **cloud solutions**, consumer credits, **insurtech** aspects, the new **AML provisions for cryptocurrencies** and the status-quo of the **Libra** project. An overview in the form of a table identifies the relevant regulatory and legal topics along with their treatment.

We hope that you will enjoy this read! If you need any further information, or if you would like a consultation, please do not hesitate to contact one of our advisers in the FinTech team. We are happy to assist.

With best wishes
Zurich, 28 August 2020

Diana Lafita
Attorney-at-law

1 See for instance an overview of the top blockchain and crypto companies as of February 2020: https://FinTechnews.ch/blockchain_bitcoin/top-50-blockchain-and-crypto-companies-in-switzerland-and-liechtenstein-in-2020/32901/

The right strategy requires an integrated multi-jurisdictional approach for global businesses

We are best placed to assist you with solutions that work on a cross-border basis

Legal and regulatory aspects in a nutshell

Relevant topics	Summary regulatory and legal treatment	In force / in draft form
Does the FinTech company require a **banking licence**?	The professional collection of funds from the public - more than 20 customers or public solicitation – with a right of repayment of a defined amount of money mainly requires a banking licence. The following options should be reviewed: - **Sandbox (no licence)**: up to **CHF 1 million of funds**, non-interest bearing, customers to be informed that no supervision and no deposit insurance applies. - **Settlement accounts (no licence)**: funds kept for a **max. of 60 days** in a settlement account, non-interest bearing. - **FinTech licence** (lower regulatory requirements): up to **CHF 100 million of funds**, non-interest bearing, not on-lend (therefore, no deposit insurance), relaxed regulatory requirements, customers to be informed accordingly. - **Standard banking licence**	In force
	- **The following do not qualify as funds professionally collected from the public**: monies of regulated entities, monies of persons with business or family ties, monies of qualified shareholders, monies of institutional investors with professional treasury, monies which are a consideration or a guarantee for buying goods or services, bonds or obligations issued by issuing a prospectus, monies inserted in a minor scale into a payment system for the acquisition of goods and services (e.g. prepaid cards), monies guaranteed by a bank.	
	ICO organizers only require a banking licence if the issuer assumes an obligation of repayment of a defined amount towards investors.	In force
	Cryptocurrencies' issuers do generally not grant a right of repayment and, to this extent, no banking licence applies.	In force
	In connection with *prepaid cards, wallets and payment tokens*, it is relevant to mention that in the case of monies inserted in a payment system **for the acquisition of goods and services** up to CHF 3'000 per client (non-interest bearing), no banking licence applies.	In force
Is the digital **transfer of asset tokens (shares/ bonds)** valid without a written signature?	Strict interpretation of the current law refers to written signature. Such signature mainly allows hand written signature or the digital signature which is, under Swiss law, subject to different requirements which makes it in certain cases less practicable for online-solutions. Payment tokens are not affected by this problem and can be transferred without formalities.	In force
	Swiss Federal Council issued a **Report** to support a final interpretation of the law already allowing transfer of asset tokens on the blockchain.	Issued
	Draft DLT-Law to allow the creation of *uncertificated register securities (Registerwertrechte)* with same features of certified securities (*Wertpapiere*) that can be transferred via a register built on the blockchain.	Draft-Law

Are token holders protected from **bankruptcy** of the third-party custodian?	Possible interpretation of the current law may result in assets or tokens mixed with assets of bankrupt custodian (no concerns in case of co-custody).	In force
	A **Report** of the Federal Council considers however that segregation applies.	Issued
	DLT-Law clearly establishes **segregation** of **crypto-assets** (asset tokens and payment tokens) and of **data** of the bankruptcy estate. When **deposited with banks**, Draft DLT-Law qualifies tokens as deposited assets/objects like chattel or securities to be **segregated** in case of bankruptcy of the bank.	Draft-Law

What are the features of **DLT trading platforms**? Who are their participants?	Until the date, a) trading platforms did not conduct also post-trading services like depository and clearing and settlement services; and b) only certain financial institutions like banks or fund management companies were admitted as participants to trading platforms, making this business more difficult to access for FinTech start-ups.	In force
	DLT-Law to create new licensed category of trading platform, the **DLT-trading venue**, for *uncertificated register securities* (asset tokens) that can accept **natural or legal persons as participants** and provide with **custody, clearing and settlement** services. Payment tokens can also be traded.	Draft-Law

Do Swiss AML provisions apply to payment tokens / cryptocurrencies?	FINMA has confirmed the **application of Swiss anti-money laundering provisions** to service providers of payment transactions on the blockchain, such as exchanges, wallet providers and trading platforms.	In force
	FATF standard for VASPS: Threshold for identification of the contracting party in transactions involving exchange of currencies **lowered from CHF 5'000 to CHF 1'000**. This new provision covers exchange of virtual currencies amongst themselves or against FIAT currencies.	Draft

What is the regulatory treatment of **stable coins**?	FINMA has issued **Guidelines** on the regulatory qualification of stable coins depending on their economic function, the assets on which the stable coin is backed and the rights of holders.	Issued

Does a FinTech company have to follow **rules of conduct at point of sale**?	In case of qualification of an asset token as financial instrument and the provision of **financial services** according to the FinSA (*offering and sale/ acquisition of financial instruments to/from/for clients, receipt and transmission of orders in connection with financial instruments, portfolio management, investment advice and granting of loans for the acquisition of financial instruments*) the FinSA framework becomes relevant. The duties depend on the **client segmentation** (*institutional, professional or retail*). Amongst other duties, financial service providers must comply with **conduct rules and organizational measures, register with a client advisor register, and affiliate with an ombudsman's office**. The rules on **advertising** are already in force.	In force with transitory provisions for conduct rules and organizational measures

What are the main regulatory provisions to consider in the insurtech business?	While conducting the insurance and reinsurance business is mainly subject to a licence from FINMA and certain aspects of the broker activities are regulated and subject to registration, other insurtech activities are not subject to a licence.	In force
	Transferring part or all of a so-called significant function of an insurer or reinsurer to an insurtech company is subject to the regulations on **outsourcing** and FINMA notification/approval.	In force
	The revised Insurance Supervision Act includes a **new exemption** to supervision for insurance companies that follow **innovative business models** with certain conditions and subject to FINMA approval.	Draft

What are the main regulations around **cloud services**?	Transferring **customer identification data** (CID) to a cloud or third-party service provider is subject to professional secrecy and data protection regulations. Mainly, data can be transferred to service providers/servers that qualify as agent (*Beauftragter*) **located Switzerland** by complying with certain due diligence and care obligations following the *need-to-know* principle, without it being considered as a disclosure or breach of professional secrecy regulations. In order to transfer **data to other countries**, more stringent regulations apply, like the requirement to **encrypt/anonymize data or the request of the customers' consent**.	In force

Regulatory and legal questions for FinTech companies in Switzerland

Q1: What are tokens and what can be achieved with the use of the so-called Distributed Ledger Technology (DLT)?

In the FinTech-jargon, tokens are defined as units of information that have been registered using the Distributed Ledger Technology (**DLT**). This technology allows to register information in a decentralised manner, which means that all participants (and not a sole central administrator) contribute to the registration of such information using a consensus mechanism. The advantages of such systems are amongst others that there is no intermediary required, lower costs, higher efficiency and reduced fraud as a result that there is no single participant who can individually amend the information registered. Blockchain is one of the most used DLT architectures. Blockchain groups transactions into "blocks" for joint validation among participants allowing to follow the transaction history by attaching new blocks to the previous ones (in the form of a "chain")[2].

In line with national and international assessments by regulators including the Swiss Financial Market Supervisory Authority (FINMA)[3], tokens are conceptually divided into three categories based on their economical function:

- **Payment Tokens** that represent a value or immaterial asset like a virtual currency such as *Bitcoin* or *Ether*. They do not embody any claims against an issuer, as opposed to asset tokens.
- **Utility Tokens** that provide access to a digital application or service, which uses a DLT infrastructure. To the extent that they do not follow an investment purpose and the token can be used at the point of issue, their nature is not relevant for the financial market regulations.
- **Asset Tokens** that represent debt or equity. They are legally speaking claims against an issuer. Asset tokens mainly embody shares (equity) or obligations (debt), including derivative instruments. Also tokens that represent physical assets are included into this category.

Furthermore, the term of Initial Coin Offering (**ICO**) has played a central role in the DLT arena. An ICO can be defined as an issuance of blockchain-based coins or tokens to investors by an organizer of a (FinTech-)project to be financed[4]. FINMA has issued several guidelines for participants to be able to assess the regulatory implications of ICOs. Based on the aforementioned guidelines, FINMA does also issue rulings if an enquiry is submitted to FINMA[5]. Recently, the concept of security token offerings (**STO**) has become relevant as an offering of an asset token, where the shares or bonds qualify as securities[6].

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2 Federal Council, Legal framework for distributed ledger technology and blockchain in Switzerland, An Overview with a Focus on the Financial Sector, Bern, December 14, 2018, (**Federal Council Report**) p. 17.

3 See FINMA Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), 16 February 2018 (**FINMA ICO Guidelines**)., p.3.

4 See also FINMA ICO Guidelines, p. 1.

5 See Minimum Information Requirements for ICO Enquiries, FINMA ICO Guidelines, Appendix.

6 Even if in Switzerland, there is a legal concept for the term "securities", the term STO is mostly used in the international FinTech jargon. When used in Switzerland, it is however recommended to assess whether the token legally qualifies as a security under Swiss law, given that particular legal requirements will apply.

Q2: Where does Switzerland stand regarding FinTech regulation and especially to DLT technology?

Already in 2017, Switzerland issued amendments to the Banking Act of 8 November 1934 (**BA**) and the Banking Ordinance of 30 April 2014 (**BO**) to establish lower regulatory requirements for the professional[7] collection of funds from the public which was until then mainly reserved for banks, making this activity accessible to FinTech companies. Such amendments operate either as exemptions to the licensing duty of the BA (so called *sandbox*) or as a simplified banking license category (so called **FinTech licence**).

The above-mentioned amendments to the regulation of professional collection of funds include:

- ***Settlement Accounts***: keeping deposits from the public on a so-called settlement account for a period of maximum 60 days which are not interest-bearing does not qualify as professional collection of funds which requires a banking license[8]. This exception applies for instance to *money transmitting* and *crowdfunding*[9] solutions;
- "***Sandbox regime***": a company not licensed as a bank can publicly collect funds of up to CHF 1 Million, if they are not interest-bearing. Customers must be individually informed of the fact that the company is not supervised by FINMA and that there is no deposit insurance (*Einlagensicherung*)[10];
- "***FinTech-Licence***": a company that collects funds from the public of up to CHF 100 million in a professional manner is subject to a FINMA licence with less strict requirements than a standard banking licence[11]. The funds cannot be invested by the licence holder, and no interest can be paid on them.

  This licence category is also referred to as *banking licence light*[12].

Even if the above provisions set out a very broad and helpful framework for the entry into the market of FinTech start-ups, they do not address the features of tokens and **DLT technology**, and the legal difficulties faced by them.

Therefore, in early 2018, based on the numerous blockchain initiatives taking place in the Swiss financial arena, representative professors and experts in the financial market sector issued common publications such as the Position Paper on the Legal Positioning of ICOs published under the Blockchain Taskforce[13]. Important legal questions arising out of the use of tokens for the financing of a project were analysed and some ideas for a future regulation which could solve the uncertainties were presented.

Furthermore, the Swiss Federal Council published a report dedicated to the legal and regulatory treatment of blockchain and DLT solutions (the **Federal Council Report**[14]) where it states that it wants to "*create the best possible framework conditions so that Switzerland can establish itself and evolve as a leading, innovative and sustainable location for FinTech and blockchain companies*[15]". In March 2019, a pre-draft for a Federal Law on the Adaptation of Federal Law to the Developments on Distributed Ledger Technology (**Draft DLT-Law**) was issued with the aim to address the legal uncertainties that may be attached to the use of tokens in the financial services industry. It is expected that the Parliament will examine the proposal in 2020.

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7 According to Art. 6 BO the criterion of professionality is given if more than 20 customers are served on a permanent basis or the services are publicly solicited.

8 Art. 5 para. 3 lit. (c) BO does not consider such settlement accounts as funds.

9 FINMA Circular 2008/3 Public funds of Non-Banks, N 16*.

10 Art. 6 para. 2 BO.

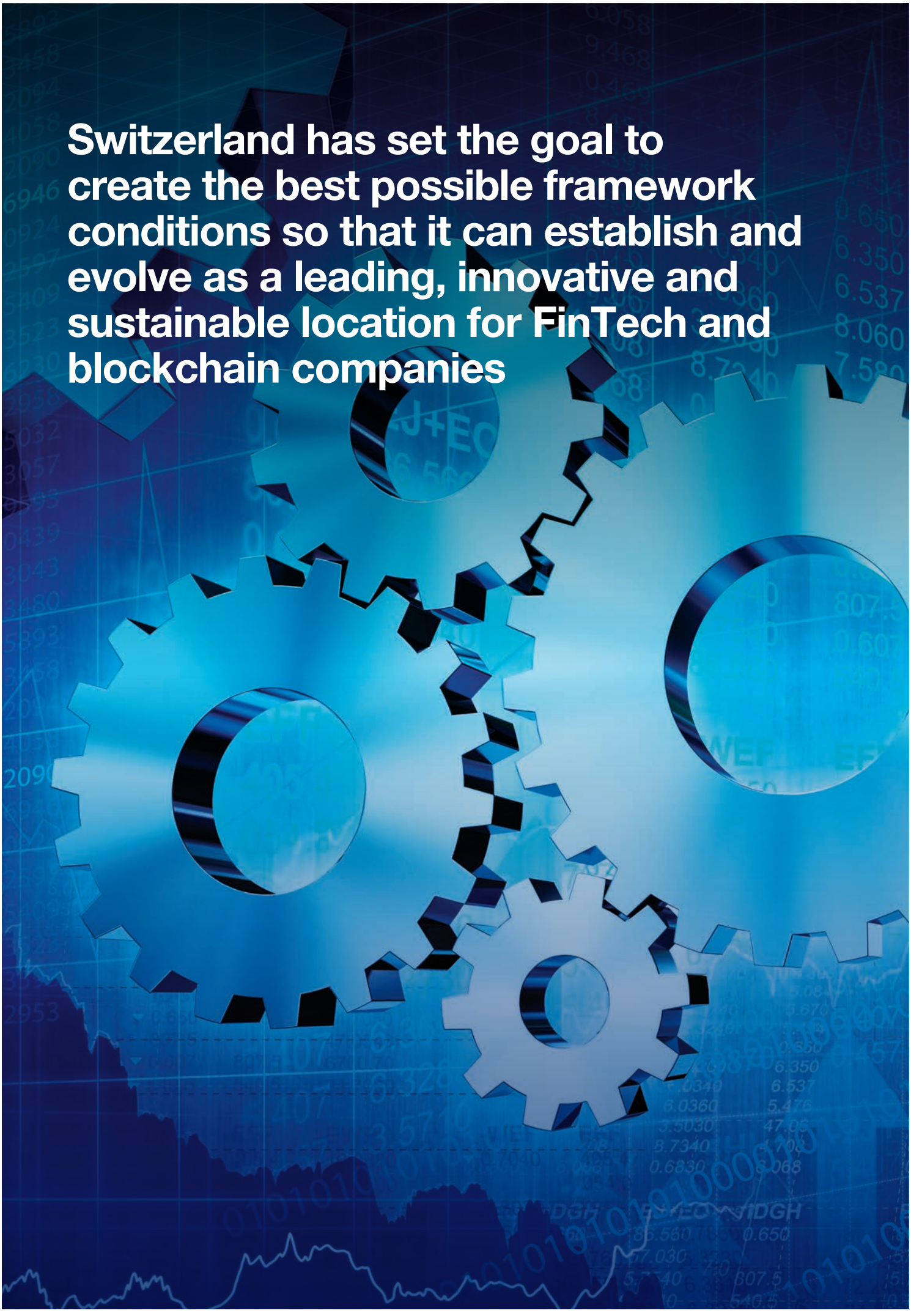
11 Art. 1*b* BA.

12 As of July 2020, the sole company holding this licence is Yapeal AG (https://yapeal.ch/), which offers an online account with a visa debit card and digital wallet, combined with other services.

13 Eggen, Mirjam/ Glarner, Andreas/ Hess, Martin/ Iacangelo, Salvatore/ Stengel, Cornelia/ Weber, Rolf H., Position Paper on the Legal Positioning of Initial Coin Offerings, Bern/Zug, April 2018.

14 See definition in FN 1.

15 Federal Council Report, p. 8.


Switzerland has set the goal to create the best possible framework conditions so that it can establish and evolve as a leading, innovative and sustainable location for FinTech and blockchain companies

In this context it is important to mention that, as opposed to other jurisdictions, Switzerland has traditionally followed a **principle-based** and **technology-neutral** legislative and regulatory approach. This makes it less formalistic and comprehensible for both business players and regulators.

Q3: Which are the main legal concerns under the current regime and how are they solved?

The main legal concerns are the following:

a. Anti-money laundering risks of cryptocurrencies

Payment tokens such as **cryptocurrencies** raise primarily Anti-Money-Laundering (**AML**) concerns. Due to the decentralization of the DLT, payment systems can exist in theory without an intermediary that maintains the control.

Licensed financial institutions like banks are automatically subject to the Anti-Money-Laundering Act of 10 October 1997 (**AMLA**)[16] and directly supervised by FINMA in connection with AML compliance. In addition, other players that are not subject to a licence of FINMA are subject to AMLA if they conduct certain activities that are relevant for AML purposes[17]. Such players must affiliate with a Swiss self-regulatory organization (**SRO**) for AML supervision[18].

FINMA has already made clear that Art. 2 para. 3 lit. b) AMLA, which relates to services in the context of payment transactions (*Dienstleistungen für den Zahlungsverkehr*), is also applicable to providers of payment services with tokens on a blockchain infrastructure[19], even if tokens are not considered as official means of payment in Switzerland. The latter is particularly applicable to systems for payment tokens and covers the **exchange of cryptocurrencies among themselves and exchange of cryptocurrencies for FIAT currencies**.

In connection with payment systems issuing payment tokens, FINMA has published the **Guidance 2/2019 Payments on the Blockchain** following the new international standards of the Financial Action Task Force (**FATF**). According to the guidance, virtual asset service providers (**VASPs**) such as exchanges, wallet providers and trading platforms are subject to AMLA. They must therefore affiliate a self-regulating organization as financial intermediaries within the para banking sector if they are not licensed financial institutions subject to AMLA supervision by FINMA. Such providers are obliged "*to verify the identity of their customers, to establish the identity of the beneficial owner, to take a risk-based approach to monitoring business relationships and to file a report with the Money Laundering Reporting Office Switzerland (MROS) if there are reasonable grounds to suspect money laundering*"[20]. In connection with payment orders, information about the customer and the beneficiary must be registered.

According to a new draft article *transactions with virtual currencies*[21] expected to be inserted into the revised FINMA Anti-Money-Laundering Ordinance of 3 Juni 2015, as amended (**AMLO-FINMA**), the identity of the customer must be verified in transactions exchanging virtual currencies amongst themselves or against FIAT currencies, if one or several related transaction reach the amount of **CHF 1'000**[22].

FINMA already adapted the regulations to new technologies by issuing **FINMA Circular 2016/7 "Video and online identification"** to allow the video and online identification of clients for AML purposes.

b. Transfer of asset tokens

As mentioned before, asset tokens, which represent a right or claim against a counterparty like an issuer, are subject to certain civil law restrictions when transmitted electronically[23]: under the Swiss Code of Obligations the transfer or assignment of claims (*Forderungsabtretung*) requires **written form**, meaning that the written signature

16 Art. 2 para. 2 AMLA.

17 Art. 2 para. 3 AMLA.

18 Art. 12 AMLA.

19 FINMA ICO Guidelines, p.6.

20 FINMA Guidance 2/2019 Payments on the Blockchain, p.2.

21 Art. 51*a* draft AMLO-FINMA. See explanatory report to FINMA hearing to developing provisions to FinSA and FinIA of 7 February 2020.

22 Exceptions apply in case of long-term client relationships.

23 For more detail, see Report Federal Council, p. 59 ss.

of the transferor is needed. The same requirement applies to the assignment of uncertificated securities (*Wertrechte*). Even if certain existing instruments may allow to fulfil the written form requirement in a way that might be executed together with the registration into the blockchain (for instance using **electronic signatures**), such instruments do not perfectly fit within the concept of blockchain databases, which may be conceived much more simpler. Also, the system of **intermediated securities** (*Bucheffekten*) does not generally fit to all blockchain structures given that it requires a licensed custodian (*Verwahrungsstelle*)[24].

The Federal Council has confirmed that it seems justified to attach to an entry into the blockchain the same effects than to the physical assignment of a security[25], given that the publicity created by the blockchain is comparable to the ownership of a security. The same logic should apply to the assignments of securities that require written form. The Federal Council Report increases legal certainty for existing business models, but the fact that the law does not explicitly provide for this possibility and that there is still no decision from the Federal Supreme Court in support of such an interpretation makes an amendment of the law ideal to create a more secure legal environment for the transfer of asset tokens. Accordingly, the **Draft DLT-Law**, which could take effect in early 2021, envisages the following amendments:

Amendment to securities law

The Swiss legislator has taken an efficient and technology-neutral approach and thus it has not created a separate law or legal system for blockchain or DLT-based rights, but it has inserted this technology swiftly into the civil-law system. Given that asset tokens traded through the blockchain should embody rights that can easily circulate, they share many features with so-called certificated securities (*Wetpapiere*), as securities that are attached to a paper instrument capable of circulation. Instead of paper, they are attached to a digital database. Therefore, the bill establishes in a draft Art. 973 lit. (d) of the Swiss Code of Obligations a **new category of uncertificated securities** (*Wertrechte*) which do have the same features and legal treatment as certificated securities[26] and are called ***uncertificated register securities*** (*Registerwertrechte*).

As such, *uncertificated register securities* can be created when i) they are registered in a register and ii) can only be enforced and transferred through such register. Both the debtor and the creditor of the tokens or *uncertificated register securities* must agree on the use of the DLT registration. The DLT-register must comply with particular security and transparency features and include the information required for securities to be created and transferred. They share the legal features of certificated securities, namely that:

a. the right they embody cannot be exercised or transferred without the instrument (in this case the asset token registered in the register of *uncertificated securities*);
b. the debtor (issuer) is only entitled to fulfil against the creditor as specified on the instrument (in this case the asset token registered in the register of *uncertificated register securities*);
c. the possession of the instrument through the registration of *uncertificated register securities* (in this case disposition capacity of a user over an asset token) serves as proof of entitlement (principle of publicity) and so protects *bona-fide* acquirers.

The new bill makes clear that the provisions regarding the pledge over rights or claims (*Forderungen*) apply to the pledges over asset tokens in the form of *uncertificated register securities*. Only two amendments have been included to clearly allow the creation of pledges over asset tokens[27]: a) the pledge can be created without performing any kind of transfer of the *uncertificated register securities*; and b) the pledge agreement is not subject to any formal requirements (as it would be for instance the case for rights or claims which are not certificated[28]). What is required is that the pledge is recorded in the register and that the secured creditor can acquire the disposition power over the asset token in case of default.

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24 For more detail on the institutions that can qualify as custodian, see art. 4 of the Federal Intermediated Securities Act of 3 October 2008.

25 See Report of Federal Council, p. 9.

26 See Art. 965 CO.

27 Draft Art. 973*f* CO.

28 Art. 900 CC.

It must be borne in mind that the **"underlying" rights** to *uncertificated register securities* can only be the same as for certificated securities. These are claims (*Forderungen*) but not rights *in rem*, i.e. property rights on physical assets, except that they can be securitised like is the case of mortgage certificates (*Schuldbriefe*) and bonds secured by mortgage rights (*Anleihenstitel mit Grundpfandrecht*). Tokenising other kind of rights of property which is not subject to be embodied by certificated securities, like cars or even real estate would be a huge (or even at this stage rather impossible) challenge from a legal point of view given that there would exist on the one hand an object and on the other a token representing the same object, which would create legal uncertainties due to the possible dual possession, transferability, publicity and other *bona fide* related aspects which are core to the fundamental concept of property under Swiss law.

The bill does not make any further precision as to any particular provisions applying to shares or bonds, as this was not absolutely necessary and it will allow market players to decide how to fulfil the legal requirements of the particular instrument they will chose through the programming of the DLT-registries. There is however some literature on how for instance tokenized shares could be issued and what this would mean for a company from a corporate legal perspective[29].

In case of the same right being embodied by both a certificated security and an *uncertificated register security*, the good faith holder or creditor of the certificated security will be given **priority**[30].

Amendment to documents of title to goods (Warenpapiere)

The CO is amended to allow the issuance of titles to goods with "equivalent titles" which are registered in a DLT-register[31]. According to this amendment, titles equivalent to titles to goods can be registered with and transferred by means of a DLT-register.

c. Question of segregation of tokens and data in case of bankruptcy of a custodian

Given that tokens might be in third party custody, like for instance with wallet providers, it is relevant to assess whether in the course of bankruptcy proceedings of

29 Von der Crone, Hans Caspar/ Monsch, Martin/ Meisser, Luzius, *Eine privatrechtliche Analyse der Möglichkeit des Gebrauchs von DLT-Systemen zur Abbildung und Übertragung von Aktien, Gesellschafts- und Kapitalmarktrecht* (GesKR) 1/2019 („**GesKR Von der Crone**").

30 Draft Art. 973*e* CO.

31 Draft 1153a CO. Switzeland approaches in this sense the so-called Rotterdam-Rules of UNCTAD, which have been signed but not still ratified.

such a custodian, tokens would be segregated from the bankrupt's estate for the benefit of the token holders as owners/creditors. In case of multiple access to an account the question is already solved, as assets in co-custody are not included in the bankruptcy estate on one of the custodians[32].

A segregation is only possible for **objects** (*Sachen*), meaning a so-called *right in rem* as opposed to contractual rights or claims like for instance cash deposited in a bank account. Neither asset tokens nor payment tokens are considered money and they are also not considered as contractual rights, but as objects which embody either contractual rights (in the case of asset tokens) or intangible assets (in the case of payment tokens) such as virtual currencies. Therefore, the question of the segregation of payment and asset tokens should be, under a final interpretation, be answered positively.

To avoid any legal uncertainties, the **DLT-Law** establishes that in the case of bankruptcy of an intermediary that would have the of power of disposition over crypto-assets, the Debt Enforcement and Bankruptcy Act of 11 April 1889 (**DEBA**) shall be amended to clearly establish that **crypto-assets** (including payment as well as asset tokens) **are segregated** from the bankruptcy estate for the benefit of their holder.

Also, for the case that **banks** would act as depository of crypto-assets, they would have an obligation to segregate them in case of insolvency of the bank – as banks do have when securities are deposited with them.

Furthermore, the new bill provided a good opportunity to review the segregation requirements in connection with pure data. The segregation of tokens from the bankruptcy estate raised the question of whether only the tokens or also the access codes and other relevant "data" should be segregated. Tokens are anyway technically speaking mainly data.

Given the increasing importance of data, the question of the segregation of data from a bankruptcy estate had already gained importance inside and outside the financial market regulations and it has been subject of a separate parliament initiative[33]. Until the date, only assets subject to pledge could be segregated. The new bill includes a provision for the segregation of data which does not even have to relate to any economic value. According to a provision to be included in DEBA, **data** which are within the power of disposition of the bankruptcy estate can be segregated by any third party who has a contractual or statutory entitlement thereto.

The segregation of data applies independently of the possession of any tokens by the bankruptcy estate. It is not relevant whether there are any assets to segregate, but whether the bankruptcy estate is technically able to dispose of data which may be lost or cannot further be used by their data holders.

Q4: Which licensing categories are mostly relevant for FinTech projects?

a. Banking license

As a rule, the **professional collection of funds**, i.e. taking deposits from the public creating an obligation to return an amount to the customer, is - with certain exceptions - an activity reserved for licensed banks[34]. Some activities are by their nature not considered as funds or as publicly collected funds, such as for instance monies of regulated entities, or of persons with business or family ties, monies of qualified shareholders, or of institutional investors with professional treasury, monies which are a consideration or a guarantee for buying goods or services, bonds or obligations issued with a prospectus, monies inserted in a minor scale into a payment system for the acquisition of goods and services (e.g. *prepaid cards*) or funds guaranteed by a bank.

In the case of **ICOs**, the ICO organizer issuing tokens would only be subject to the BA if it would have an

32 Art. 242 para. 3 DEBA.

33 Initiative 17.410 *Dobler*: Data are the highest good of private companies. Regulate data segregation from the bankruptcy estate of service providers.

34 Art. 5 BO.

obligation of repayment of an amount towards investors[35]. ICOs have been often so structured in Switzerland, in order to avoid such banking licensing duty[36].

In the case where an intermediary would hold payment tokens, it would mainly require a banking licence to the extent that a liability to return a determined amount would be created for such intermediary. In such case, the intermediary would include such amount as a liability within its balance sheet, as it would be the case with money deposited with a bank account. In that case, the *FinTech-licence* or even the *sandbox* regime may be applicable[37]. This is mainly the case of wallet providers.

However, to the extent that the intermediary only would store the payment tokens like assets (not on-lend) on the blockchain for safekeeping, and directly register the related transactions on the blockchain without such tokens to be part of its balance sheet, tokens being stored separately for, and being attributed at all times individually to each customer, no professional collection of funds and no banking activity would be conducted according to FINMA[38].

Since the new provisions regarding the *sandbox regime, the settlement accounts* and the *FinTech licence* have entered into force between 2017 and 2019[39], the activity of taking deposits from the public has been made more accessible for new players providing with progressive regulatory duties **proportional** to the size of the business.

b. Collective investment fund regulations

Insofar as the funds or assets represented by tokens are **collectively invested** and **managed by third parties** for investors, the regulation in the Collective Investment Schemes Act of 23 June 2006 (**CISA**) becomes relevant. The project to introduce a new fund category called Limited Qualified Investor Fund (L-QIF) for qualified investors which shall not require authorisation or supervision by FINMA will create a more attractive environment for funds in Switzerland. An L-QIF will have to be managed by a supervised institution.

c. Portfolio management services

Due to the entry into force in January 2020 of the of the Financial Institutions Act of 15 June 2018 (**FinIA**), the professional management of assets of third parties is, with certain exceptions, subject to prudential supervision and a **licensing requirement** of FINMA[40].

d. Financial market infrastructures

According to the current practice of FINMA, asset tokens would constitute **securities** (*Effekten*) within the meaning of Art. 2 lit. b of the Financial Markets Infrastructure Act of 19 June 2015 (**FMIA**), if they represent certificated or uncertificated securities (*Wertrechte*) - including therefore also the new *uncertificated register securities* according to the DLT-Law - and they are standardised and suitable for mass trading[41]. For this purpose, asset tokens must be issued in large numbers and be generic identical.

The book-entry of self-issued securities is mainly unregulated[42], but the **professional underwriting and public offering on the primary market of securities issued by third parties** requires a licence as securities firm or as a bank according to art. 12 FinIA.

Also, the creation and public offering of **derivative instruments**, which are financial contracts whose price is derived of underlying assets, such as shares, bonds, commodities, precious metals, but also currencies, interest rates and indices, is subject to a license as securities firm or as a bank[43].

In addition, the **public offering** or the request for admission to trading of securities (*Effekten*) in Switzerland triggers, with certain exceptions, the prospectus duty

35 FINMA ICO Guidelines, p. 5-6.

36 GesKR Von der Crone, p. 2.

37 See FINMA ICO Guidelines, p.6.

38 See FINMA Fact Sheet on Virtual Currencies, 1 January 2019, p.2.

39 See Q2 above.

40 For more information, see also https://www.loyensloeff.com/ch/en/news/a-guide-to-switzerland-s-new-licensing-rules-for-portfolio-managers-n19012/

41 FINMA ICO Guidelines, p.5.

42 According to Art. 973 lit. (c) para. 2 of the Swiss Code of Obligations, a book must reflect the accounting records.

43 Art. 2 FMIO.


DLT-trading venues also can provide custody, clearing and settlement services
Also natural persons are allowed to be participants to DLT-trading venues

as mentioned under Financial Services Act in Question 5 below.

e. Payment systems

Regulatory speaking, a facility which **clears and settles payment obligations** (including the settlement of currency against securities) is considered a payment system. However, the FMIA establishes that a payment system only will require a licence as such if the *proper functioning of the financial market or the protection of customers so requires*[44]. The detailed regulation of payment systems is established in the Financial Markets Infrastructure Ordinance of 25 November 2015 (**FMIO**)[45]. Should a payment system become **systemically relevant**, further regulations will apply[46]. Regarding the question of whether a banking licence is required for the issuance of payment tokens, reference is made to the paragraph on *banking license* under this Question.

In addition, **Circular 2008/3 Public Deposits at Non-Banks** of FINMA sets out that monies that are inserted in a payment system for the acquisition of goods and services with a **maximum amount held of CHF 3'000 per client** and non-interest bearing are also excluded from requesting a banking license.

f. Trading platforms

Operating a platform or venue for the **multilateral or bilateral trading** of securities or financial instruments may be subject to a license as a financial market infrastructure such as a **stock exchange**, a **multilateral trading facility** or an **organized trading facility**. Foreign trading venues require a recognition from FINMA.

The FMIA shall be amended in order to create a new category of license for ***DLT-trading venues***[47]. Those are defined as a facility for the multilateral trading of *uncertificated register securities*[48] which pursues the **simultaneous exchange** of offers among several participants as well as the conclusion of contracts according to **non-discretional** rules and either:

a. admits retail customers who act in their own name and for their own account as participants; or
b. acts as a central depository of *uncertificated register securities* based on uniform rules and procedures; or
c. clears and settles deals with *uncertificated register securities* based on uniform rules and procedures.

DLT-trading venues will be therefore subject to **licensing requirements** and will have to fulfil several obligations like for instance a) the establishment of a self-regulation organisation; b) the establishment of regulatory and supervisory tasks to be carried out by independent bodies; c) the issuance of regulations for the organisation of orderly and transparent trading; d) ensure pre- and post-trade transparency; e) ensure orderly trading; f) supervise trading; g) collaboration between trading supervisory bodies; h) suspension of trading; i) appointment of an independent appeal body; j) issuance of a regulation on admission of participants; k) issuance of a regulation regarding the admission of *uncertificated register securities* to trade. Most of these obligations shall be defined by an ordinance to be issued by the Federal Council.

Given that the above requirements may be burdensome for new players, the bill also foresees lower requirements for **"smaller" DLT-trading venues**, being defined as such DLT-trading venues that entail low risks for the protection of financial market participants or the functionality of the financial system due to either a) a limited number of participants; b) a limited trading volume or c) a limited volume of assets in custody.

g. Custody and settlement services of securities and financial instruments

Acting as central custodian of securities (securities depository) or providing clearing and settlement of transactions of securities or financial instruments may be subject to a licence as financial market infrastructure. DLT-trading venues also cover the provision of **clearing and settlement** of *uncertificated register securities*. This gives DLT-trading venues a much more **accessible** alternative compared to the other trading venues in the FMIA as DLT-trading venues **can accept retail customers as participants** and do not need any further intermediary to participate as outlined above.

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44 Art. 4 para. 2 FMIA.

45 Art. 66 ss. FMIO.

46 Art. 22 ss. FMIA.

47 Draft Art. 73a ss. FMIA.

48 See definition on Question 3, *Amendments to securities laws*.

h. Licensing aspects of stable coins

The question of whether and which kind of licence is required for the issuance and provision of services related to stable coins has gained importance and some uncertainty arose in early 2019.

To avoid uncertainties, FINMA issued new Guidelines in September 2019 (**FINMA Stablecoins Guidelines**) in order to address possible application of licensing requirements to the issuance and provision of services related to stable coins and as a supplement of FINMA ICO Guidelines.

According to FINMA Stablecoins Guidelines, the following main rules shall serve as an indication for the regulatory assessment of the different types of stable coins:

- Stable coins having a **FIAT currency** or another cryptocurrency as underlying and giving the user a redemption right at a fixed price against the issuer: considered as deposits of money in a bank account, and therefore subject to the BA.
- Stable coins having a **basket of FIAT currencies** or cryptocurrencies as underlying: if they constitute a right against the issuer, risks will be on the balance sheet of the issuer and therefore they will be considered as a banking deposit and the banking licence requirements have to be considered; if the basket is managed separately for the account of the investors, the regulation of collective investment schemes (investment funds) may apply.
- Stable coins with a **fix link to commodities** with right of **claiming the particular value of the underlying**: if commodities qualify as banking precious metals, then the stable coin is considered as an account of precious metals and the banking licensing regulations apply; if the commodities are not banking precious metals, they can be considered as a security or as a derivative financial instrument.
- Stable coins with a link to commodities with **ownership rights (rights in rem) of commodities**: In the case where a right of the customer is not a simple claim against the issuer to redeem the value of the underlying, but an ownership right or so called right *in rem* on the underlying, which can be transferred and the commodities are not mixed with others, the stable coin will not be considered as a security, but as a deposit (*Hinterlegung*) (as opposed to a bank deposit) and prudential regulation will not apply.
- Stable coins linked to a **basket of commodities** and the customer has a right to get the value as the basket develops: the collective investment funds regulations may apply.
- Stable coins linked to the **value of real estate**: the collective investment funds regulations may apply.
- Stable coins linked to the **value of securities**, where the issuer owes the customer the value of

the underlying security: considered as securities or eventually, derivative financial instrument.

- Stable coins linked to a **basket of securities**: the collective investment funds regulations may apply.

The approach of FINMA to the above qualifications is *principle based* and means that it will apply the regulations based on the economic risks of the business, assessing always according to the premise **substance over form**. Money deposited with financial intermediaries that gets mixed with the intermediary's assets results in the customer having a risk of bankruptcy of such financial intermediary – therefore the bank licensing rules shall apply, including capital requirements. If a token with the characteristics of a security (an investment) is issued, the customer is subject to the issuer's risk of bankruptcy, besides the risks of the security itself and needs to be protected against such risks[49]. If, on the contrary, ownership rights of the underlying assets are given to the customer, the risk of bankruptcy of the issuer disappears, even if other risks still may need to be protected but in general no prudential regulation of the issuer shall apply in the latter case.

For more certainty and practical implementation reasons, **FINMA issues rulings** to potential interested parties who must provide with the necessary information on their projects in advance.

i. Cross-border aspects of licensing requirements

In general, activities are subject to a licence if the financial institution has a main **"physical presence" in Switzerland**. Under this well-established practice, it is decisive where the financial service provider conducts its main activity. It is a sign that a financial service provider conducts an activity mainly in Switzerland, when has a physical presence in Switzerland by being registered in the Swiss commercial register or domiciled in Switzerland; or when it is established outside of Switzerland but has a "factual" branch or agency in Switzerland, employing for instance personnel that represent it in Switzerland.

The decisive factor for requiring a Swiss licence from FINMA is not based on individual aspects but on a **general assessment** of the activity conducted in Switzerland. According to jurisprudence[50] which is

49 The option to structure such a deal as a bond in compliance with the prospectus regulations which would not qualify as public deposit / collection of funds according to art. 5 para. 3 of the BO can be assessed in these circumstances. See FINMA press release of 27 March 2019, envion AG, as a case where the prospectus requirements were not fulfilled.

50 See Federal Court Decision 2A. 91/2005 E.5.

mentioned as reference example by the recently issued Explanatory Report to the Financial Services Ordinance (**FinSO**), the Financial Institutions Ordinance and the Supervisory Organizations Ordinance[51], recurrently booking Swiss clients with a foreign branch of a Swiss financial institution for the avoidance of Swiss AML provisions should be subject to Swiss AML regulations and regarded as a Swiss branch.

Therefore, the cross-border provision of punctual services that are subject to a licence in Switzerland does not always trigger a licensing requirement in Switzerland, especially if no physical presence is created and the activity is not mainly provided from Switzerland or to Swiss clients. Being FinTech services often provided through the **internet** without a real need of a physical presence, particular attention should be paid to businesses that are mainly or especially addressed to Swiss clients from abroad.

On the contrary, if Swiss clients find and request on their own initiative services from a foreign financial service provider, the service is not mainly addressed to them and therefore generally not in scope of Swiss regulations.

j. Insurtech and insurance licence

The conduct of **insurance and reinsurance business** is mainly subject to a licence from FINMA. Only activities that entail transmission of risks against payment of a premium calculated based on statistics, agreeing the payment of an amount as compensation in case of future risk occurrence are considered as insurance subject to licence[52]. Activities that are not independent, i.e. ancillary to another business, are excluded from the licensing duty. A further exemption is the case of activities of minor economical relevance which is granted by FINMA on its discretion.

The Insurance Supervision Act of 17 December 2004 (**ISA**) is under revision and includes a new **exemption** for companies with **innovative business models** when they serve the sustainability of the Swiss financial centre and the customers' interests are secured[53]. This last fact must be evidenced by the applicant. It may be expected that such exemptions are granted based on a reduced number of insured persons or of a low amount of risks and that corresponding information duties of insureds apply. Insurtech companies conducting real insurance business are mainly platforms for the pooling of risks that allow for instance customers (**peer-to-peer**) or insurers to share their risks based on a contract with each other.

Besides the insurance and reinsurance businesses, also insurance **brokers** are subject to regulations. If brokers are considered as independent, i.e. not bound to an insurance company, they must register with a FINMA register. All brokers must fulfil information duties towards customers. Several insurtech projects conduct brokerage activities by distributing insurance products by means of online platforms and applications that offer certain efficiencies. It is to be considered that the revision to the ISA envisages new more extensive conduct rules for insurance brokers.

Most insurtech models deal with functions to be used by insurers (**backoffice**) or customers (**apps**), to facilitate their activity, without conducting an activity subject to license or registration. However, to the extent that insurtech companies conduct significant functions of an insurer as defined in the Outsourcing Circular 2018/3, such activities will be subject to the relevant regulations as outlined in Question 7, lit. e) below.

Q5: Which other fields of the law are mostly considered as relevant by FinTech start-ups?

Mainly, the following provisions deserve to be mentioned and should be considered while shaping FinTech projects:

a. The Consumer Credit Act

The granting of credits to a person that uses them for purposes different from its professional activity (i.e. to a consumer) is mainly subject to the Consumer Credit Act of 23 March 2001, as amended (**CCA**). Due to the increasing existence of **crowdlending platforms**, the CCA was amended in 2019 to cover this new activity. The main characteristics of the CCA with especial relevance for FinTech firms are as follows:

51 See p. 85 of the mentioned Explanatory Report.

52 Federal Court Decision BGE 107 Ib 56.

53 Art. 2 para. 3 lit. b draft ISA.

- It applies when either the **credit provider** (classic case) **or an intermediary** of consumer credits, including providers of crowdlending platforms[54], conduct the activity in a **professional** manner[55];
- It does not apply, amongst others, to credits that are secured by a mortgage or a pledge, to credits which are granted for free without any interest or costs attached; to credits below CHF 500 or above CHF 80'000 or to credits that have to be paid back within three months or less[56];
- The contract requires **written form**. Even if this was discussed during the last revision of the CCA, the written form prevailed and therefore it is still required that either a genuine signature or a digital signature are used[57];
- A **licence** granted by the Cantons (provinces) is required for the credit provider or the intermediary that act professionally[58]. The license is valid for the whole Swiss territory. The licensing conditions refer mainly to fit and proper requirements, a professional indemnity insurance and sufficient knowledge for conducting the intended activity.
- Certain **obligations** apply to the professionally acting credit provider or intermediary, like the examination of creditworthiness of the debtor, notification duties to a special information body or the prohibition of aggressive publicity; and certain additional regulations apply to consumer credit contracts, like a right of cancellation by the debtor within 14 days of the conclusion of the contract and regulations on the costs of the credit.

b. The Financial Services Act

Should tokens qualify as **financial instruments**, the provision of financial services in connection with them would be regulated by the FinSA. While **asset tokens** embodying shares, participations, bonds, units of collective investment schemes etc. will mainly qualify as financial instruments[59], payment tokens are not expected to be qualified as financial instruments according to FinSA[60]. The FinSA establishes duties for the provision of financial services like the acquisition and disposal of financial instruments from/to specific clients; the receipt and transmission of orders in connection with financial instruments, portfolio management, investment advice or the granting of loans to finance transactions with financial instruments. This affects FinTech projects such as roboadvice or digital asset management.

In the case of asset tokens qualifying as **securities** (*Effekten*) being offered to the public in Switzerland or applying for admission to trade on a trading venue, a requirement to issue a prospectus would arise, unless an exception applies according to art. 36 to art. 38 FinSA.

c. Professional secrecy and cloud services

Information obtained from clients by banks and other licensed financial institutions is subject to the duty of professional secrecy[61]. A breach may lead to criminal and civil liability as well as to regulatory sanctions and fines.

A central question when dealing with the transfer of information to a third party is whether the latter qualifies as an "**agent**" (*Beauftragter*) of the bank or financial institution. Agents are persons mandated by the bank or financial institution to perform a task or service for them. The regulatory provisions on banking and professional secrecy subject such agents to the duty of professional secrecy too, reason why they (i) must treat such information with the same care as the bank or financial institution; and (ii) the transfer of information to them by the bank or financial institution does not qualify as a *disclosure*. However, if customer identification data (**CID**) are passed to other countries, there is a risk that the transfer may be regarded as a *disclosure*. In such a

54 The intermediary providing a crowdlending platform grants credits in a coordinated manner, allowing non-professional credit providers to participate.

55 See Art. 4 CCA.

56 See Art. 7 CCA.

57 See Arts. 13-15 of the Swiss Code of Obligations.

58 See Art. 39 CCA. In the Canton of Zurich, for instance, the further requirements can be found under https://www.zh.ch/de/wirtschaft-arbeit/gewerbe-betriebsbewilligungen/bewilligung-konsumkredite.html

59 See definition in Art. 3 lit. (a) FinSA.

60 See also Art. 3 (1) FinSO, according to which *claims arising from an account or custody agreement for payment or physical delivery of foreign currencies, fixed-term deposits or precious metals are not deemed to be financial instruments within the meaning of Article 3 letter a FinSA.*

61 Such as the banking client secrecy established in art. 47 of the BA and its equivalent provisions of professional secrecy in Art. 69 FinIA and art. 147 FMIA.

If cloud services are considered as significant functions, the rules on outsourcing may apply

case, either a consent of the customer or a transformation (anonymization, pseudonymization or encryption)[62] of data may be necessary.

The Swiss Bankers Association has published in June 2020 the second edition of Cloud Guidelines[63] with non-legally binding recommendations relating to the use of *cloud* services by banks.

Cloud providers offer access to computing resources such as networks, servers, storage, applications and other services[64], for which purpose, information of clients is transferred to the cloud, managed by the service provider. The provision of *cloud* services to banks and other financial institutions qualifies according to most authors as a mandate or agency and therefore the relevant transfer of data to such cloud providers is generally not considered as a breach of the professional secrecy duties[65]. However, a transfer of client data to the *cloud* should comply with the following due diligence and care obligations as also outlined by the **Cloud Guidelines**[66]:

- Due diligence and care when selecting the cloud provider;
- Constant risk- based assessment and monitoring of the cloud provider;
- Agreement with cloud provider on data security to follow appropriate local and international standards;
- Agreement with cloud provider includes broad right of access and information, audit and control of the *cloud* by the bank. The bank should know where the data is always being stored and processed;
- Subcontracting by or changes of the *cloud* provider should be first agreed by the financial service provider on a case-by-case basis after a detailed review of the related risks;
- Additional measures, like data anonymisation, pseudonymisation and encryption, as well as the establishment of corresponding contractual provisions will help to reduce the risk of breach of professional secrecy, and is especially recommended if CID trespass the Swiss borders and are processed, stored or accessed from outside of Switzerland;
- Coordinated procedure agreed with the cloud provider in case of requests of regulators;
- Access by the financial service's auditors to the cloud data must be agreed;
- Information of customers is required under data protection legislation.

In addition, to the extent that the cloud services are considered as **significant functions** for a licensed financial institution, bank or securities firm, the whole will be also subject to the rules on **outsourcing** as detailed below. Also, appropriate risk management processes must be built around data handling[67], as outlined below.

d. Data protection

Data protection laws apply to the processing of personal data. The processing of particularly sensitive personal data and of personality profiles is subject to the **consent** of the relevant data subject and requires the registration of files with the Swiss Federal Data Protection and Information Commissioner.

Data protection rules only allow to collect and process personal data which are strictly necessary for the provision of services to the customer (**need to know principle**). Accordingly, adequate care must be dedicated to the collection, processing and handling of customer data. On a cross-border basis, it is important to consider the EU's General Data Protection Regulation (**GDPR**), given its extraterritorial effect on data of EU clients.

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62 Being effective, i.e. not allowing in fact the cloud service provider or third parties to decipher the client identity. If there are any keys or access mechanisms, they should only be provided to limited persons within the bank or financial institution on a need to know basis and standard security measures should be implemented.

63 Swiss Bankers Association, Could Guidelines, A Guide to Secure Could Banking, 2nd edition, June 2020 (Cloud Guidelines).

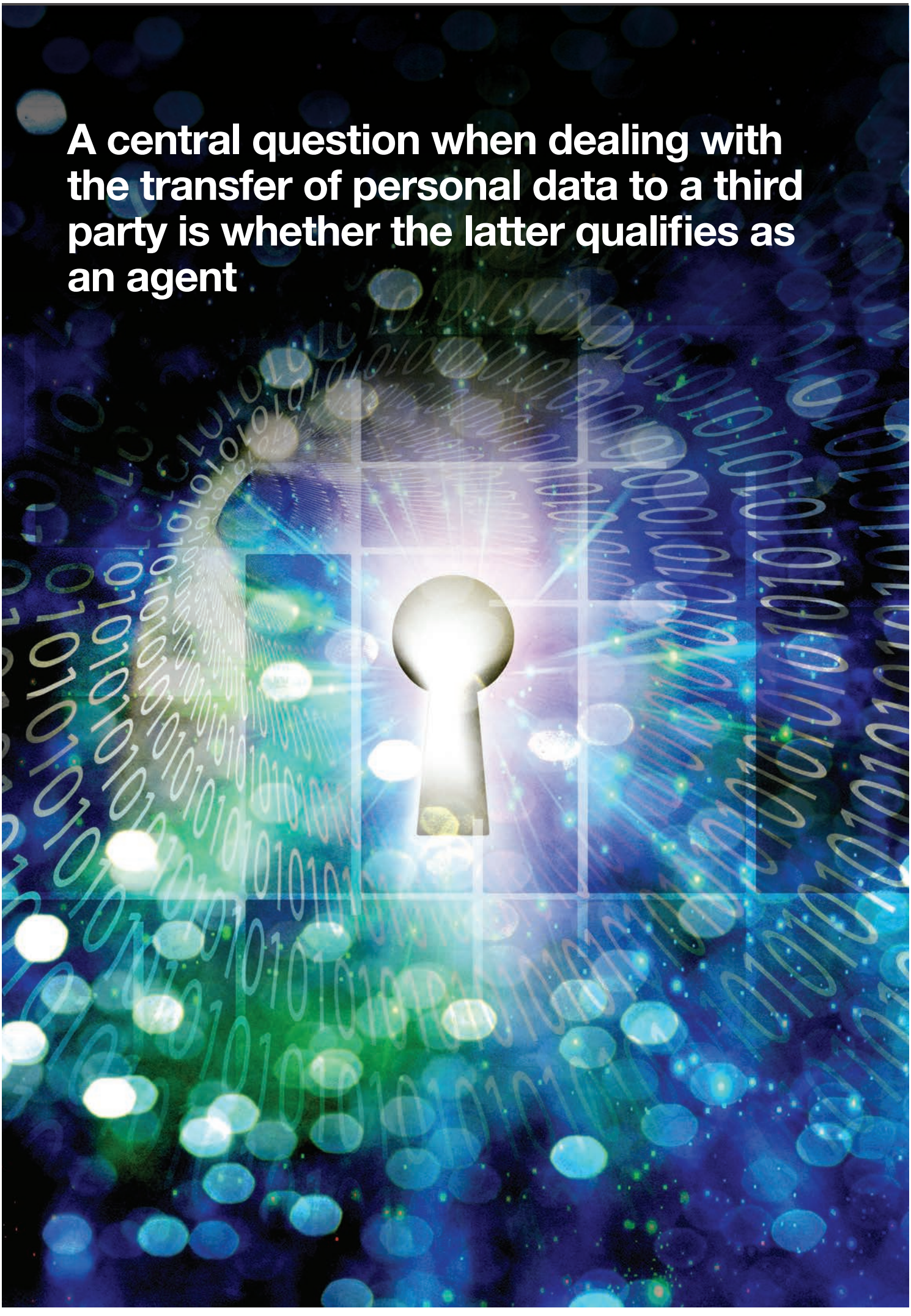
64 See also SBA Cloud Guidelines, p. 8.

65 Hirsch, Célian / Jacot-Guillarmod, Emilie, SZW/RSDA 2/2020, Les données bancaires pseudonymisées – Du secret bancaire à la protection des données, p. 153.

66 See also Cloud Guidelines.

67 See FINMA Circular 2008/21 Operational Risks Banks, in connection with the handling of so-called Client Identifying Data (CID).

A central question when dealing with the transfer of personal data to a third party is whether the latter qualifies as an agent



Passing customer data to third parties for their processing is subject to certain conditions, such as the transfer being necessary for the provision of the services or for statutory reasons, and that the third party handles such data according to the law.

The Swiss Federal Data Protection Act is currently under **revision**. It is expected that the current duties are more aligned with the GDPR in order to allow Switzerland to be considered a country with adequate protection from an EU point of view. The new provisions will insert more comprehensive information and notification duties, higher fines and a stronger protection of data subjects. From a FinTech perspective, it is relevant to mention that ***profiling***[68] shall be in the future subject to stricter requirements, especially if it entails a risk for the relevant data subject and specific rules shall apply when using systems that make automated decisions based on personal data collected.

e. Open banking and outsourcing

FinTech solutions are very varied and interact constantly amongst them or with established conventional services. The services' set-up and the involved players will define the applicable legal framework:

- When a **financial institution mandates a third-party** service provider to perform all or part of a function that is **significant**[69] to its business activities **independently** and on an ongoing basis, the applicable requirements on outsourcing apply[70]. Financial institutions remain responsible towards FINMA for the selection, instruction and supervision of the third-party service provider as well as for the provision of the service[71]. The outsourcing must be notified to FINMA in advance and require in certain cases to be approved by FINMA[72]. Outsourcing of investment decisions is subject to different requirements depending on the financial institution. Functions of supervision and control by the governing bodies, strategic decision-making or decisions concerning the commencement and termination of business relationships cannot be outsourced by a licensed financial institution.
- If, on the contrary, **it is the client of a financial institution** who decides to use a service of a **third-party service** provider and this service can be used in combination with for instance the services offered by a bank, an **open banking** constellation is created. The Swiss Bankers Association has issued a Position Paper in February 2020 and an Overview (*Auslegeordnung*) in July 2020 with non-binding recommendations around open banking. The SBA supports the fact that in Switzerland, there is no mandatory provisions according to which banks are forced to provide third-party providers with access to bank accounts and client data[73]. Banks can therefore decide whether they cooperate with third-party service providers to allow open banking solutions, most of them having a FinTech context. Transfers of client data will in this constellation require the consent of the client.

f. Tax aspects

In June 2020, the Swiss Federal Department of Finance made public that, for the moment, no tax legislative amendments were required in the context of the rapidly developing blockchain businesses[74]. Switzerland is currently in the process of amending the withholding and transfer stamp tax regimes with the aim of increasing the attractivity of the Swiss financial centre. In this context and for the same reason, the Federal Department of Finance did **not** consider it necessary to (i) extend the application of the withholding tax to income generated by asset tokens or to (ii) consider DLT trading platforms as securities firms for transfer stamp tax purposes.

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68 Understood as the automated processing of personal data in order to predict an individual's conduct or circumstances.

69 By having a material effect on compliance with the aims and regulations of financial market legislation.

70 For banks, securities dealers and insurances, the BA and ISA, as well as the FINMA Outsourcing Circular 2018/3 applies. For financial institutions according to FinIA, art. 14 FinIA and art. 15-17 of the Financial Institutions Ordinance apply and the Outsourcing Circular 2018/3 is planned to be applicable.

71 Art. 17 FinIO.

72 Art. 3 para. 3 of the BA.

73 As it is required under the EU Directive 2015/2366 on Payment Services 2 (PSD 2).

74 Federal Financial Department, Report related to a potential amendment of tax law to the developments of distributed ledger technology, Bern, 19 of June 2020.

g. Intellectual property rights

FinTech companies can protect their ideas or individuality of their business by different means. While **copyright law** protects ideas in the way they are expressed if they are original or novel, like a software or computer program; **patent rights** protect inventions, such as complex processes that add new value to the current state of the art. As a rule, companies have the exclusive right to exploit IP developed by their employees in the fulfilment of their employment objectives and obligations.

Furthermore, the company's logos, names and graphical or visual representations can be registered and protected as **trademarks**. **Unfair competition** law adds additional protection in case of products or services being reproduced by third parties by confusion of customers.

Finally, handling the internal know-how as a **trade secret** can be key for new FinTech projects to develop. This can happen by means of contractual confidentiality provisions and internal guidelines to be agreed with employees and business partners.

Q6: What is the status quo of Facebook's project Libra? Where does the journey end?

Libra is a project for a global payment system that uses cryptocurrencies built on the blockchain. The Libra Coins used are so-called ***stable coins*** as their value is linked to liquid and stable government securities referred to as the Reserve[75].

The State Secretariat for International Financial Matters (**SIF**) made public its view that Libra may generally contribute to reduce costs in the payment system and accelerate transactions[76]. Switzerland and its regulator are willing to follow developments and have regular contact with the representatives of Libra as well as with international institutions and regulators regarding the overview and assessment of potential risks that may be attached to the Libra project.

Rather than prohibiting Libra, Switzerland may apply to it its regulatory framework which is designed to both establish a healthy and competitive financial market and protect public interests such as for instance customer protection, AML regulations and the control of systemic risks.

One of the key elements of Libra is the **Reserve**[77]. While the reserve will be managed by Libra at the beginning, the project is open for central banks in the future to issue **central banks digital currencies** that could then use the Libra network and assume the management of the associated Reserves.

On 16 April 2020, an application for **licence as payment system** was filed with FINMA by the Libra Association[78]. A payment system is automatically subject to the Swiss anti-money laundering provisions. Additional requirements based on bank-like risks, may be imposed by FINMA following the premise *same business, same risks, same rules*.

75 https://libra.org

76 SIF communication of 30 September 2019.

77 https://libra.org/en-US/white-paper/

78 See FINMA press release of 16 April 2020: Libra Association: FINMA licensing process initiatied.

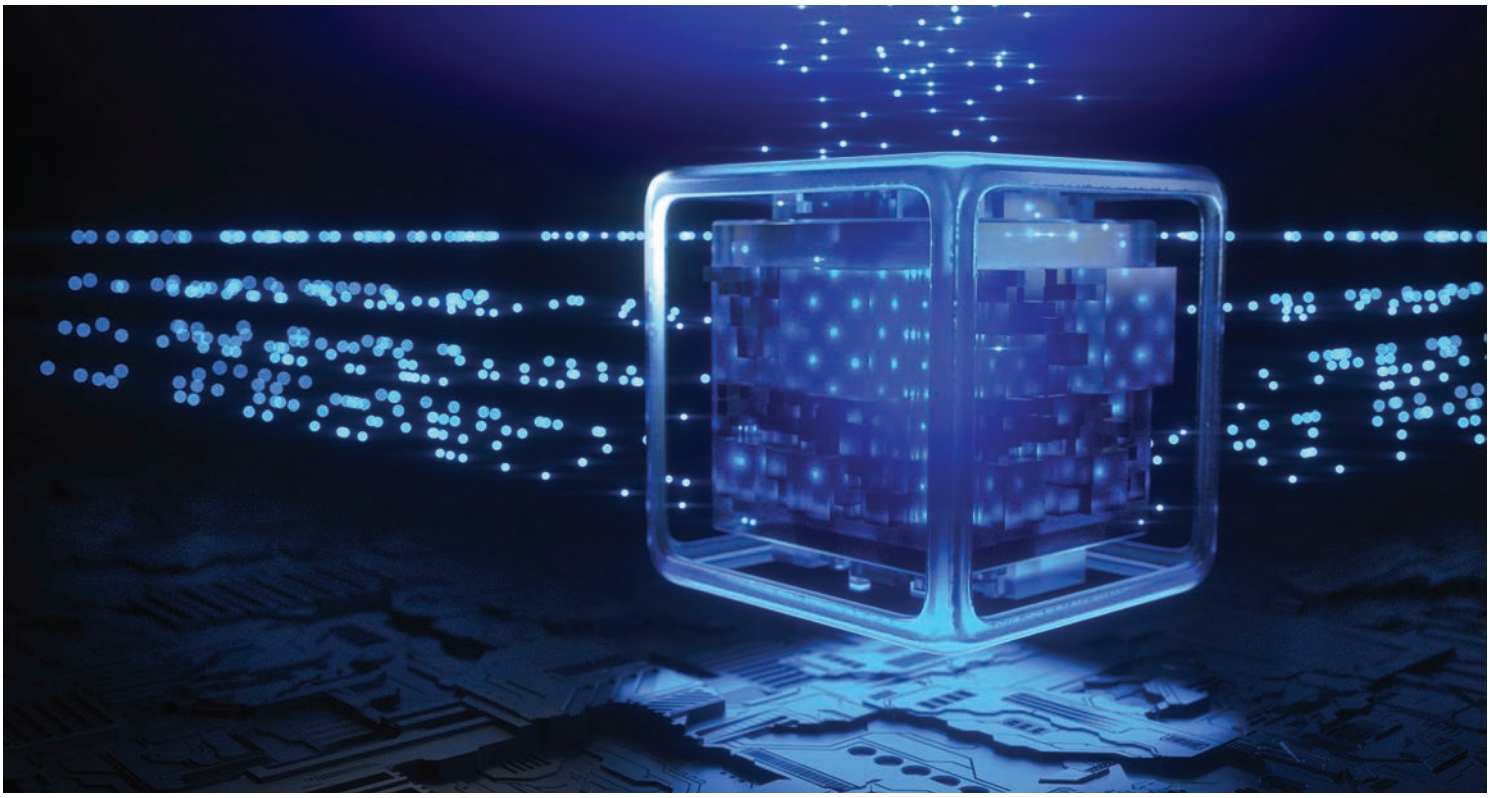
The project includes the issuance of a) **single currency stable coins** as well as; b) **a multi-currency payment token**. This split follows the reasoning that the multi-currency Libra alone may have exerted influence on the currencies used and impacted the respective monetary policies behind them[79]. The project sets Switzerland on the lead of one of the most promising projects in the FinTech sector at a global level.

While the vision of Libra is currently related to, amongst other things, enable a more inclusive global financial system, the impact could possibly go beyond individual needs and national issues, changing the habits of population in terms of payments. In the case where a new digital currency would have to substitute current means of payment, central banks would have to be involved to preserve their public functions and manage monetary policy. In Switzerland, preliminary questions on the legal structure of a **Central Bank Digital Currency** are starting to be assessed[80].

It remains to be seen how private initiatives and public functions will interact to let technology disrupt the traditional banking and financial services industry while preserving public interest.

79 Libra White Paper published in April 2020.

80 Eggen, Mirjam / Stengel, Cornelia, Wholesale CBDC, GesKR 2/2020, p. 200ss.



Our service proposal - A global approach

We have defined FinTech as one of our core areas for growth. For this purpose, it is crucial for us to serve clients with integrated, cross-border and multi-jurisdictional advice. Especially digital solutions which are available from multiple countries require the close cooperation of teams in different jurisdictions as well as deep understanding of cross-border solutions.

What sets our FinTech team apart is that we are an **international, multi-disciplinary team** in every sense of the word. We have the ability to see FinTech challenges from different perspectives by combining our expertise on financial laws and regulations, data protection and privacy, IT law and smart contracts, digital competition, capital markets, tax and corporate advisory. We can in addition leverage our international expertise through assistance from our offices in the **Netherlands**, **Belgium** and **Luxembourg**, besides **Switzerland**. Different structures can be assessed while comparing benefits and disadvantages of establishing the companies or marketing their products in different countries.

Considering our multi-disciplinary team, international presence, experience with innovative technology and entrepreneurial spirit we can provide the legal assistance a FinTech player needs in today's FinTech landscape.

Our FinTech team is experienced with innovative technology applications due to collaboration with the dedicated Blockchain team within Loyens & Loeff.

Last but not least, our open and entrepreneurial culture fits well with the dynamic FinTech sector. We understand the challenges of establishing a new business and can closely relate to the challenges our clients are faced with.

Finding answers to questions and assisting in relation to license requirements, client documentation, marketing disclaimers, data privacy and tax aspects developing or using FinTech solutions is at the very heart of our FinTech team. We have experience with providing legal assistance for numerous FinTech applications such as:

- online lending applications
- trading platforms
- crypto-fund structures
- innovative payment solutions
- investments in cryptocurrencies
- ICO/ITO activities
- fund raising platforms
- asset management solutions

LOYENS & LOEFF

Contact

Do you need more information after having read this overview? Or would you like to find out more about the details or how a project could be implemented? Feel free to contact our FinTech advisers for a preliminary consultation or for more detailed advice.

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