

Briefing December 2018

Legal framework for new Swiss fintech licence finalised – entering into force January 2019

The Swiss Parliament adopted the Financial Institutions Act (FinSA) and the Financial Services Act (FinIA) on 15 June 2018. In the course of this fundamental legislative project, it also implemented a previously announced initiative that aims to benefit innovative financial businesses: It introduced the legal basis for a new regulatory licence type, commonly referred to as 'fintech licence' or 'banking licence light' in a new article 1*b* of the Federal Banking Act (BankA).

On 30 November 2018, following a consultation period, the Federal Council adopted a number of amendments to the Federal Banking Ordinance (BankO), specifying the requirements that will apply to applicants and holders of a fintech licence and thereby defining the statutory framework for the new licence type in more detail.¹ The new provisions of the BankA and the BankO will enter into force on 1 January 2019, opening up new and more flexible business opportunities for fintech operators such as crowdfunding platforms and electronic payment services providers.

New fintech licence type

The introduction of the fintech licence type by way of the new article 1*b* BankA completes the three-pillar fintech programme of the Swiss Federal Council announced on 2 November 2016.² The two previously implemented pillars consist of (i) the extension of the maximum holding period of third party monies in settlement accounts to 60 days and (ii) the introduction of a regulatory 'sandbox' creating an unregulated regime for small innovative projects (both in force since 1 August 2017).

The fintech licence sits squarely between the traditional banking licence and the unregulated innovation sandbox. Conceptually, the new licence type is not designed specific for a particular business activity or model. Quite to the contrary, it aims to create an adequate, technology-neutral regulatory framework for any business that needs to accept deposits from the public without engaging in typical commercial banking activities. This concept differentiates the Swiss fintech licence from other licence types at a similar level in jurisdictions outside of Switzerland, e.g. payment service provider or

¹ See the media release of the Federal Council of 30 November 2018, available under: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-73186.html>.

² See the media release of the Federal Council of 2 November 2016, available under: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64356.html>.

e-money institution licences in EU member states. That said, the Swiss legislator took note of these foreign licence types and designed the Swiss solution with the objective of not imposing comparatively stricter licence requirements.

Features

Fintech licence holders will be allowed to accept and hold (and to solicit the acceptance and holding of) deposits from the public, on a professional basis, for amounts of up to CHF 100 million (article 1b (1)(a) BankA). The Federal Council can amend the ceiling amount in the future if required to maintain the innovation potential and competitiveness of the Swiss financial marketplace (article 1b (2) BankA). Furthermore, the Swiss Financial Market Supervisory Authority FINMA also has the discretion to apply the rules on the fintech licence to businesses holding more than CHF 100 million on deposit in particular cases if client protection is ensured by specific measures (article 1b (5) BankA). So far, FINMA has not provided further guidance on this potential option.

However, where multiple legal entities form a group, the CHF 100 million ceiling will, in principle, be calculated across the entire group. FINMA retains the power to grant exemptions if individual entities are demonstrably independent from the rest of the group (article 24a BankO). In this respect, it remains uncertain to what extent this exemption will be available to affiliates of banking groups who would like to use the fintech licence to establish an 'innovation lab' for testing out new business models.

Licensing requirements

In a similar way to Swiss banks, fintech licence holders will be licensed and prudentially supervised on an ongoing basis by FINMA and will need to appoint a regulatory audit firm (article 1b (4)(c) BankA). As a matter of principle, the provisions of

the BankA will apply by analogy to fintech licence holders, but the amended BankO sets out less onerous requirements regarding organisation, risk management, compliance, accounting and financial resources. The simplified comparison table below provides an overview of the key licence requirements. On 3 December 2018, FINMA published guidelines on the content and procedure of fintech licence applications to clarify its expectations regarding future applications.³

No commercial banking

The key limitation of the new licence type will be that the licence holder is not allowed to engage in commercial banking business with maturity transformation. In particular, the deposits accepted from clients must not be invested and no interest may be paid on them (article 1b (1)(b) BankA).

Fintech licence holders will be required to hold deposits separately from their own assets or book them so that they can at any time be identified separately (article 14f (1) BankO). If the second option is chosen, the fintech licence holder is subject to an ordinary financial audit requirement.

The funds on deposit can either be held as sight deposits with a bank or another fintech licence holder or in the form of category 1 high-quality liquid assets under the meaning of the Swiss Liquidity Ordinance. Importantly, the fintech licence holder needs to ensure that the currency in which the assets are deposited and the one in which the client claims are denominated match up.

Access to interbank clearing

The explanatory report on the amended BankO does not provide any clarity on whether fintech licence holders will be eligible to participate in the Swiss interbank clearing system and/or be allowed to hold

³ See the FINMA Guidelines for FinTech licence applications pursuant to article 1b of the Banking Act of 3 December 2018, available under: https://www.finma.ch/en/~/-media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/w_bewilligungfintech_20181203_de.pdf?la=en.

central bank sight deposit accounts, as both are subject to the rules of the Swiss National Bank. In our view, these aspects should be clarified soon, as the ability to have direct access to the clearing system is an important element to the business model of certain potential fintech licence applicants such as payment service providers.

No Depositor Protection

Deposits held with fintech licence holders will not be subject to the Swiss depositor protection regime, which remains solely for banks. To account for this fact and generally to ensure that clients are aware of the limited protection of assets deposited with fintechs, licence holders will be required to inform prospective clients sufficiently in advance of the risks associated with their business model, their services and the technologies used as well as the lack of depositor protection (article 7a (1) BankO). Clients must be able to download and store this information – or commit it to physical form – at any time.

Anti-Money Laundering

As financial intermediaries, fintech licence holders will also be subject to Swiss anti-money laundering (AML) regulation.

In this context, FINMA as the competent authority proposed to introduce less stringent organisational requirements for fintechs than those applicable to banks in AML matters.⁴

The consultation on the amendments to the FINMA Anti-Money Laundering Ordinance ended on 26 October 2018, but the finalised ordinance has yet to be published. The amendments are expected to enter into force at the same time as the BankA and the BankO amendments relating to the fintech licence.

Crowdlending

In parallel with the amendment of the BankA to introduce the new fintech licence type, the Consumer Credit Act (CCA) was also amended. Consumer loans that are obtained through a crowdlending platform will need to comply with the same consumer protection afforded by the law (article 2 lit. b CCA) as if they were extended by a professional lender.

In the context of the amendment of the BankO, certain implementing provisions in the Consumer Credit Ordinance have also been adopted, such as access to consumer credit information systems and professional indemnity insurance requirements for crowdlending platforms. The amended consumer credit legislation will come into force on 1 April 2019.

Summary and Outlook

The new fintech licence closes the gap between unregulated (or merely AML-regulated) activities and the highly regulated traditional banking business. It will enable businesses which depend on holding deposits of clients to operate their business in Switzerland without having to obtain a fully-fledged banking licence. This approach lifts what was until now an insurmountable barrier for many such projects. Furthermore, fintech licence holders will profit from the market recognition that comes from prudential FINMA supervision. That said, while the reduced regulatory requirements are appealing, the deposit ceiling of CHF 100 million and the limitations on handling client deposits may deter some potential licence applicants.

It remains to be seen how the new licence type will be received by potential applicants. Certainly, Switzerland has shown itself time and time again to be an attractive jurisdiction for innovative businesses and the financial industry in particular. The fintech licence regime has the potential to encourage and enable the next wave of fintech entrepreneurs to choose Switzerland as their base.

⁴ See the media release of FINMA of 28 August 2018, available under: <https://www.finma.ch/en/news/2018/08/20180828-mm-gvv-finma/>.

	Banking Licence	Fintech Licence	Innovation Sandbox
Scope	<p>Persons mainly active in the financial sector that:</p> <p>a) on a professional basis, accept deposits from the public > CHF 100 million or publicly solicit such deposits; or</p> <p>b) (i) on a professional basis, accept deposits from the public ≤ CHF 100 million or publicly solicit such deposits, and (ii) invest or pay interest on the public deposits; or</p> <p>c) on a large scale, refinance themselves with several unaffiliated banks in order to finance, for their own account, an undetermined number of unrelated parties in any manner (article 1a BankA).</p>	<p>Persons mainly active in the financial sector that (i) on a professional basis, accept deposits from the public ≤ CHF 100 million or publicly solicit such deposits, and (ii) neither invest nor pay interest on the public deposits (article 1b BankA).</p>	<p>Persons that (i) accept deposits from the public ≤ CHF 1 million, (ii) do not engage in the interest margin business (<i>Zinsdifferenzgeschäft</i>), and (iii) comply with certain information duties (see below) (article 6 (2) BankO).</p>
Provisions of BankA and BankO	Directly applicable.	BankA applicable by analogy (article 1b (1) BankA); BankO application limited to provisions specifically referring to fintech licence applicants / holders.	Not applicable.
Supervision by FINMA	Ongoing prudential supervision.	Ongoing prudential supervision, less onerous requirements than for banks.	As such, no ongoing prudential supervision by FINMA; depending on business activities, other regulatory licence or registration obligations may apply (e.g. AML supervision).
Regulatory Audit by an Authorised Audit Firm	Required (article 18 (1) BankA).	Required (article 1b (4)(c) BankA), less onerous requirements than for banks.	Not required.

	Banking Licence	Fintech Licence	Innovation Sandbox
Risk Disclosure / Information Duties	–	<p>Must inform clients, allowing sufficient time prior to entering into a contract for the client to form an understanding of the information, in writing or otherwise in the form of text, (i) about the risks associated with the business model, services and technologies used, and (ii) that the deposits are not covered by the Swiss depositor protection regime (article 7a (1) BankO).</p> <p>The information must not only be included in general terms. If provided in electronic form, the fintech licence holder has to ensure that the information can be downloaded, saved and/or committed to physical form at any time (article 7a (3) and (4) BankO).</p>	<p>Must inform depositors, prior to accepting any deposits, in writing or otherwise in the form of text, that (i) the business is not supervised by FINMA, and (ii) the deposits are not covered by the Swiss depositor protection regime (article 6 (2) BankO).</p>
Financial Resources	<ul style="list-style-type: none"> – Minimum capital of CHF 10 million (article 15 (1) BankO; in practice often more); – Capital adequacy ordinance and liquidity ordinance are applicable (Swiss implementation of Basel principles). 	<ul style="list-style-type: none"> – Minimum capital of 3% of the public deposits, but at least CHF 300,000 (article 17a (1) BankO); – Capital adequacy ordinance and liquidity ordinance are not applicable (article 17a (3) BankO). 	<p>Depending on the specific circumstances (potential requirements according to Swiss corporate law).</p>
Legal Form	<p>Typically joint stock companies (<i>Aktiengesellschaft</i>) or, in some cases, cooperatives (<i>Genossenschaften</i>) are used. Some private banks take the form of limited partnerships (<i>Kommanditgesellschaften</i>) or partnerships limited by shares (<i>Kommanditaktiengesellschaften</i>).</p>	<p>Permissible legal forms are limited to (article 14a (1) BankO):</p> <ul style="list-style-type: none"> – Joint stock company (<i>Aktiengesellschaft</i>); – Partnership limited by shares (<i>Kommanditaktiengesellschaft</i>); and – Limited liability company (<i>Gesellschaft mit beschränkter Haftung</i>). 	<p>No restrictions.</p>

	Banking Licence	Fintech Licence	Innovation Sandbox
Corporate Governance	<ul style="list-style-type: none"> – If the business purpose or scope of business require a special body for ultimate direction, supervision and control, it must consist of at least three members (article 11 (1) BankO); – Members of the body responsible for ultimate direction, supervision and control cannot be part of management (article 11 (2) BankO); – Banks in supervisory categories 1-3: independent risk control and compliance functions; banks in supervisory categories 4-5: sufficient to appoint a person in the executive management to be responsible for the risk control and compliance functions (FINMA circular 2018/3, N 9). 	<ul style="list-style-type: none"> – If the business purpose or scope of business require a special body for ultimate direction, supervision and control, it must consist of at least three members (article 14d (1) BankO); – At least 1/3 of the members of the body responsible for the ultimate direction, supervision and control must be independent of the management (article 14d (2) BankO); – Monitoring of compliance and risk management may be outsourced to third parties (article 14e (4) BankO). 	No specific requirements other than pursuant to Swiss corporate law.
Swiss Depositor Protection Regime	Yes.	No (information duty, rules on acceptable forms of holding assets on deposit).	No (information duty).

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