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FinTech Regulation

How do Regulators React to Technology in Financial Services? A Comparative Study

This article focuses on the influence of financial technologies (FinTech) on crowfunding, cryptocurrency, and banking law in general. The approach is a comparative one. Regulation of FinTech in the UK, Australia, and Switzerland are scrutinized and compared. The aim is to provide a concise overview of the current regulation all three legal systems and establish the status quo. The information gathered shall serve to analyse the situation in Switzerland and to indicate legal developments pro futuro, or criticise the current situation. The article concludes with an endorsing attitude towards progressive development, yet recommending also a Swiss pragmatic approach, that is, looking abroad first and implement what has proven effective already only.

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1. Introduction

[Rz 1] In this paper, I am going to assess the current regulatory developments in Switzerland, the UK, and Australia as far as financial technologies are concerned. It is my aim to give a first brief overview of the technologies that are considered to be FinTech and to provide some explanation of the mechanisms and concepts they rely on. This shall help to become acquainted with the rather recent developments in the market. It shall also give guidance when focusing on particular technologies and their regulatory regime, so I can focus on the technologies that need regulatory reform the most. I will then provide an overview of the regulation of a few particular financial technologies in Switzerland, the UK, and Australia. My aim is not just to assess the current legal situation but also, and maybe more importantly so, to overview the manifold regulatory approaches that are currently being undertaken regarding these technologies. Many of my findings will draw from governmental sources and journalism since most of the developments are very recent and have not found their way into the literature yet. At the end of the paper, I will try to critically evaluate my findings and comment on the future development of FinTech in Switzerland.

2. Financial Technologies

[Rz 2] In recent years, the term FinTech has received more and more attention. The Neue Zürcher Zeitung has published numerous articles regarding innovation and technology in financial

services in the past year[1]. It seems almost as if FinTech has created a hype when one reads the newspapers. But what does FinTech actually mean? What does it include, or what is FinTech and what is not FinTech? FinTech is a compound word and consists of «financial services» and «technology»[2]. This comprises many actors and technologies in the financial sector and covers also emerging or even yet unknown players or technologies in this particular field. Due to the legal need to define concepts and emerging technologies in this area this very flexibility of the term leads to difficult questions, as we will see later, when it comes to the regulation of technological innovation. In this chapter, the reader is introduced to several financial services that have been profoundly influenced by recent technological development. It is necessary to briefly overview the substantial developments in the FinTech sector before the paper will focus on those particularly influenced by regulation.

2.1. Crowdfunding

[Rz 3] Crowdfunding as a superordinate concept comprises a great many of heterogeneous subcategories, such as crowddonating, crowdlending, and crowdinvesting, which is also referred to as crowdfinancing, investment-based crowdfunding, crowdfund investment, or equity crowdfunding[3]. Those terms are not used uniformly[4]. However, in this paper, crowdfunding is used as the superordinate concept that comprises all other concepts; this is in accordance with Baumann. As far as my lingustic competence is concerned, «to fund» and «to invest» have certain individual particularities that are unique to each of these verbs. The idea of receiving something in return is more closely connected to the verb «to invest» than to «to fund». It therefore seems cogent to use the terms as Baumann does[5].

[Rz 4] Basically, crowdfunding consists of the receipt/acceptance of financial means, either as a donation, a loan, or an investment, given by numerous individuals of the public (the «crowd») to an individual, a firm, or project. The novelty lies in the fact that the financial means are not provided by a single entity, e.g. a bank, which raises a rather substantial amount of money, but by a larger public. In this case, each of the numerous individuals provides for a small amount of

1 Jürg Müller, Bank oder nicht Bank, Neue Zürcher Zeitung, 12 November 2016 (https://www.nzz.ch/meinung/regulierung-von-fintech-bank-oder-nicht-bank-ld.127966 [all websites last visited on 9 May 2018]); Jürg Müller, Fintech – Was 2016 war und wie es weitergeht, Neue Zürcher Zeitung, 19 December 2016 (https://www.nzz.ch/jahresrueckblick-2016/jahresbilanz/jahresbilanz-fintech-was-2016-war-und-wie-es-weitergeht-ld.131137); Jürg Müller, Mutig – aber nicht konsequent genug, Neue Zürcher Zeitung, 2 November 2016 (https://www.nzz.ch/meinung/fintech-regulierung-in-der-schweiz-den-mut-auf-halber-strecke-verloren-ld.125969); Daniel Imwinkelried, Warten auf das Fintech-Wunder, Neue Zürcher Zeitung, 24 January 2017 (https://www.nzz.ch/wirtschaft/digitalisierung-des-bankgeschaefts-warten-auf-das-fintech-wunder-ld.141412); Hansueli Schöchli, Spielwiese für Jungfirmen im Finanzsektor, Neue Zürcher Zeitung, 1 February 2017 (https://www.nzz.ch/wirtschaft/fintech-spielwiese-fuer-jungfirmen-im-finanzsektor-ld.143139).

2 Simon Schären/Günther Dobrauz-Saldapenna, Neuste Entwicklungen in der Fintech-Regulierung, Expert Focus, 8/2016, p. 542.

3 Simone Baumann, Crowdinvesting im Schweizer Finanzmarktrecht (Diss.), Zürich/Basel/Genf, 2014, N 2, p. 16 s.

4 «Unter dem mitunter uneinheitlich verwendeten Oberbegriff Crowdinvesting werden die Subkategorien Crowdfunding, Crowdlending (auch Peer-to-Peer-Lending) und Crowddonating/Crowdsupporting verstanden», Schären/Dobrauz-Saldapenna (note 2), p. 543; however, Baumann (note 3) writes: «Bei Crowdinvesting als Unterkategorie von Crowdfunding tritt nach der hier [...]», N 19, also: «Gegenstand dieser Arbeit ist das Crowdinvesting. Bei dieser Form von Crowdfunding finanzieren [...]», N 2.

5 In accordance with Baumann (note 3), Stengel/Weber use the same terminology, see: Cornelia Stengel/Thomas Weber, Digitale und mobile Zahlungssysteme: Technologie, Verträge und Regulation von Kreditkarten, Wallets und E-Geld, Zürich 2016, N 245 ss.

money that, once accumulated, can sum up to a substantial amount in the end. Those transactions are enabled by the internet, where the needed financial means are raised on the corresponding webpages. Those internet pages act as intermediaries between those in need of capital and those providing for it[6]. Baumann refers to those internet platforms as portals, and I will continue to use the term «portal» for said webpages[7]. Due to Swiss banking regulation, those portals can be affected by the Swiss Banking Act (BA) and be required to obtain a banking licence depending on the type of crowdfunding they use. Therefore, crowdfunding, or at least certain subcategories of it, will play an important part in the following analysis of this paper. As we will see later in more detail, Swiss regulators, scholars, and politicians are currently working on a reformation of the requirement to obtain a banking licence when dealing in certain bank-related business activities, which will have a direct effect on said portals and FinTech firms.

2.2. Virtual Money: Cryptocurrency

[Rz 5] Virtual money is not to be mistaken for electronic money (e-money). E-money is basically the electronically transformed counterpart of the money we use daily (paper money, coins), and it is therefore backed by the official legal currency-system of a country, or monetary union (e.g. US dollars, Swiss Francs, Euros)[8]. Virtual money, however, is not an official legal currency but an alternative to official money issued by central banks and controlled by the state[9]. Alternative money has many forms, e.g. World of Warcraft Money (used by players of the computer game World of Warcraft), WebMoney, Amazon Coins, and Bitcoin[10]. The most relevant in our case is Bitcoin, which is a form of cryptocurrency, that is, a virtual currency that is issued non-centrally, meaning that it is issued by a network of computers instead of a centrally controlled computer system[11]. Bitcoin has caught the attention of politicians and the Government already in 2014, when the Federal Council released a report on Bitcoin due to the postulate of National Councillors Schwaab and Weibel[12]. On the same day that the Federal Council released its report, the FINMA released also a short fact sheet (consisting of two pages) concerning Bitcoin[13]. Legal questions arising with Bitcoins concern banking law and the supervision and regulation of banks, anti-money laundry laws, and taxation. Because banking law is currently being intensely discussed, due to the fact that the trade with Bitcoins can also require a banking licence[14], it will be of substantial interest to identify those situations that require a banking licence and also how banking law should be amended. It will also be of interest to see how the regulator in general seeks to resolve the problem that FinTech firms often need to apply for a banking licence.

6 Schären/Dobrauz-Saldapenna (note 2), p. 543.

7 Baumann (note 3), N 18.

8 Stengel/Weber (note 5), N 47.

9 Stengel/Weber (note 5), N 48 s.

10 Stengel/Weber (note 5), N 49.

11 Stengel/Weber (note 5), N 49.

12 Bericht des Bundesrates zu virtuellen Währungen in Beantwortung der Postulate Schwaab (13.3687) und Weibel (13.04070), 25 June 2014 (https://www.news.admin.ch/NSBSubscriber/message/attachments/35361.pdf [alle Websites zuletzt abgerufen am 9. Mai 2018]).

13 FINMA, Faktenblatt Bitcoins, 25. Juni 2014 (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-bitcoins.pdf?la=de).

14 Bericht des Bundesrates (note 12), p. 13; Schären/Dobrauz-Saldapenna (note 2), p. 544.

2.3. E-Money

[Rz 6] E-money, as the electronic form of an official currency, has undergone immense technological change and has reached a very complex dimension. Since this paper cannot analyse every domain of FinTech and an in-depth analysis is preferred over a vague overview of manifold technologies the topic of e-money will not be considered in my research. For further readings one might consult the current literature[15]. Also, I will not focus on digital and mobile payment systems such as PayPal, ApplePay, SamsungPay, Tapit or Twint.

3. Regulation of FinTech under Swiss Banking Law

[Rz 7] In the following chapter, I focus on the recent developments and new regulatory approaches concerning the Bitcoin technology as well as crowdfunding in Switzerland. The Banking Act and its provisions can have an effect on both, Bitcoin and crowdfunding. Therefore, I will hereinafter elucidate how they can be affected and what might change in the future.

3.1. The Concept of Banks under Swiss Law

[Rz 8] There is no definition of the term «bank» under Swiss law[16]. The concepts appertaining to banks and the business of banking can be found in the Swiss federal Act on Banks (Banking Act [BA]), and its corresponding Ordinance on Banks (Banking Ordinance [BO]). Art. 2 para. 1 BO indicates that the word «banks», as used in the BA, applies to companies that are dealing mainly in financial services. To fall under the term, they might accept deposits from the public or use refinancing provided by other banks to finance persons or corporations at their own account (art. 2 para. 1 lit. a and b BO). The current regulator of banks, insurances, and financial intermediaries is the Swiss Financial Market Supervisory Authority (FINMA), which is regulated in the Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervisory Act [FINMASA]). So, the question whether a person falls under the regulation of banks can only be answered by applying the BA and BO to each individual case. It is also mandatory to obtain a banking licence from FINMA before any banking business can be conducted (art. 3 para. 1 BA). Since any person, legal or natural in nature, who professionally accepts deposits from the public is subject to the BA, she or he is required to obtain a licence (art. 1 para. 2 BA). *Deposits from the public* describe any liabilities that are not exempted by art. 5 para. 2 and 3 BO, and *professional* means any person who accepts more than 20 deposits from the public or recommends himself publicly for accepting said deposits, even if he accepts less than 20 deposits (art. 6 BO)[17]. It is therefore essential to carefully evaluate whether a banking licence is required as soon as there are

15 Stengel/Weber (note 5); Hartwig Gerhartinger, Elektronisches Geld im österreichischen Bank- und Privatrecht, Wien 2010.

16 Philipp Abegg et al., Schweizerisches Bankenrecht, Zürich/Basel/Genf 2012, p. 343; Rashid Bahar/Eric Stupp, in: Rolf Watter/Nedim Peter Vogt/Thomas Bauer/Christoph Winzeler (eds.), Basler Kommentar Bankengesetz, Basel 2013, Art. 1 N 2.

17 FINMA-Rundschreiben 2008/03 «Publikumseinlagen bei Nichtbanken», 1 January 2009 (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2008-03.pdf?la=de), p. 3.

numerous depositors. The criterion of refinancing is less critical when it comes to FinTech and the focus shall therefore remain on deposits by the public.

[Rz 9] If a person falls under the BA, he has to fulfil numerous requirements according to art. 3 BA. In particular, there is a minimum capital requirement of CHF 10 Mio (art. 3 para. 2 lit. b BA in conjunction with art. 15 and 16 BO). Exemptions from the capital requirement may be made according to art. 17 BO. There are also severe criminal sanctions against any person acting against the provisions in force. If a person conducts business in what is considered banking under Swiss law he or she may be punished for not having obtained the required licence from FINMA. The corresponding criminal provision is set forth in art. 44 FINMASA and stipulates that he who wilfully violates the requirement of a licence is liable to a custodial sentence of up to three years or to a monetary penalty. Negligence may be punished with a fine of up to CHF 250'000. The equal provision for the illegal acceptance of deposits by the public is found in art. 46 para. 1 lit. a BA. Negligence is also punished with a fine of up to CHF 250'000 (art. 46 para. 2 BA). Therefore, it is necessary to analyse in each case separately whether a person must be qualified as bank or not. If so, there are severe regulatory standards to be met.

3.2. FinTech under Swiss Banking Law

3.2.1. Crowdfunding

[Rz 10] It is often not clear whether the crowdfunding business-model is subject to supervisory regulation[18] since Swiss law contains yet no specific provisions concerning crowdfunding. The ordinary financial market and banking regulations are applicable[19]. In a factsheet published by FINMA in December 2014, it is explained that no licence is required when money goes directly from the donor to the acceptor, that is, from those financing the project to those who developed the project[20]. However, should the money circulate via an online platform and remain a certain while (more than seven days; art. 6 BO) on the account of the operator of the platform he is to check whether a banking licence is required. This might happen when he is holding the money on his account as he is still raising the needed sum for the project. The regulator further explains in his factsheet that even the developers of the project might be subject to regulation, particularly when they use the money as borrowed capital, e.g. loans, or when they deal in it professionally; also, advertisements regarding the lending of money require immediately a banking licence[21]. The Federal Council, however, communicated that FinTech firms fall regularly under the exemption under art. 5 para. 3 lit. c BO[22], which means that the money transferred is not considered a deposit by the public. Also Schönknecht holds the opinion that crowdfunding platforms fall regularly under the exemption of settlement accounts due to the short amount of time the deposits remain on a particular account[23]. This requires that the deposits be received solely in order

18 Florian Schönknecht, Der Einlagebegriff nach Bankengesetz, GesKR – Gesellschafts- und Kapitalmarktrecht 2016, pp. 300–319, p. 303.

19 FINMA, Faktenblatt Crowdfunding vom 1. Dezember 2014 (www.finma.ch/de/fb-crowdfunding.pdf).

20 FINMA, Faktenblatt Crowdfunding (note 19).

21 FINMA, Faktenblatt Crowdfunding (note 19).

22 Federal Council, Media Release «Federal Council wishes to allow for innovative forms of financial services», 20 April 2016 (https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-61427.html).

23 Schönknecht (note 18), p. 315.

to transfer them further, that no interest be due, and that the settlement be determined beforehand[24]. Schönknecht agrees, however, with the assumption that, in principle, crowdfunding platforms can fall under the concept of deposits and therefore under the BA.

[Rz 11] It becomes clear that the current situation is very insecure, and FinTech firms dealing in crowdfunding find little legal certainty in the current provisions. The Federal Department of Finance then introduced the idea to increase the amount of time deposits can be held up to 60 days and to amend art. 5 para. 3 lit. c BO accordingly[25]. They also introduced the idea that the acceptance of public deposits up to CHF 1 Mio should be possible without a banking licence[26]. This means that instead of the number of received deposits (20 deposits and more) the actual amount of money will be taken into consideration when assessing the requirement of a licence.

3.2.2. Virtual Currency: Bitcoin

[Rz 12] Bitcoin and its underlying technology, the blockchain, are seen as a technological development that has huge potential and might come along with a disrupting effect for financial business models as we know them so far[27]. It is even speculated that virtual currency might substitute central banks, clearing houses, or depositaries[28]. However, the Federal Council concludes in his report on virtual currencies, dated June 2014, that Bitcoin remains a marginal phenomenon and that there is therefore no need to introduce new legislation[29]. Also, it is mentioned the fact that mining, that is, the processing of transactions of Bitcoins initiated by users, requires an enormous amount of electric energy due to the computations conducted by miners[30]. It remains yet somewhat unclear what the actual impact of virtual currencies will be in the near future. Nevertheless, virtual currencies are affected by the current regulation as much as crowdfunding is and future start-ups and business models take this into account when choosing a location for their new concepts and businesses. It is therefore worthwhile to scrutinize the current regulation in force that yields effect on virtual currency.

[Rz 13] According to a recent judgment of the Federal Supreme Court, e-money, as a form of payment system, can be subject to the AMLA, the NBA, and the BA[31]. Therefore, payment systems can be subject to provisions against money laundering, to the supervision of the Swiss National Bank, and to provisions of the Banking Act and therefore also to the supervision of FINMA. Concerning the BA, the main issue is the same with crowdfunding: the acceptance of client's deposits can basically fall under the BA[32]. This causes once again legal uncertainty when it comes to the requirement of a banking licence from FINMA as we have seen with crowdfunding. As mentioned above, besides the issue of licencing, another area of regulation is concerned, namely

24 Schönknecht (note 18), p. 315; Federal Council (note 22).

25 Federal Department of Finance, Background Documentation, 2 November 2016 (https://www.newsd.admin.ch/newsd/message/attachments/45938.pdf), p. 3.

26 Federal Department of Finance (note 25), p. 3.

27 Luca Bianchi/Edi Bollinger, A (legal) Perspective on Blockchain, CapLaw – Swiss Capital Markets Law 2016-47.

28 Bianchi/Bollinger (note 27), chapter 2 b).

29 Bericht des Bundesrates (note 12), p. 26 s.

30 Bericht des Bundesrates (note 12), p. 8.

31 Urteil des Bundesgerichts 2C_345/2015 vom 24. November 2015 E. 4.2.

32 Compare: FINMA, Faktenblatt Bitcoin (note 13); Federal Council(note 22).

money laundering[33], which raises problems of technological neutrality[34], that is, the neutrality of regulatory provisions concerning a certain technology and its influence on its position in a competitive market compared to other technologies[35]. As far as FINMA is concerned, they hold that as of 16 July 2016, when they have finished the introduction of new rules, the current regulation is technological neutral[36]. Technological neutrality is in particular ascribed to the fact that video- and online-identification are now possible[37], whereas former asset management contracts required written form[38]. However, whether virtual currency falls under the Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act [AMLA]) is still unclear. Art. 2 para. 1 AMLA states the scope applies to financial intermediaries and dealers (dealing in goods). Financial intermediaries are enumerated in art. 2 para. 2 and 3 AMLA, and exemptions are defined in para. 4 of said provision. Art. 2 para. 2 litera d^{ter} AMLA names payment systems also as financial intermediaries, as long as they fall under art. 4 para. 2 of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act [FMIA]). The FMIA states in said provision the following: «A payment system requires authorisation from FINMA only if this is necessary for the proper functioning of the financial market or the protection of financial market participants and if the payment system is not operated by a bank.» Of course, banks fall under the term of financial intermediaries in the AMLA (art. 2 para. lit. a). As we have seen before, virtual currency plays a minor role in Switzerland as of today and it is therefore unlikely that Bitcoins are necessary for the proper functioning of the financial market in Switzerland. Regarding the protection of financial market participants, the answer becomes more intricate. It is stated, however, that the selling and buying of Bitcoins falls under the provisions of the AMLA[39]. Also, it is unclear whether the Bitcoin-technology can lead to a duty of information towards the Swiss National Bank under Art. 15 NBA. Such a duty applies to financial intermediaries. As we have seen above, payment systems might fall under this category.

[Rz 14] When it comes to taxation, it is important to know whether Bitcoin is considered property or currency. In the first case, it is considered barter and VAT is to be paid. In the second case, it is a sales contract and the buyer does not have to pay a VAT when paying with Bitcoins. Meier holds that Bitcoin must be considered currency and that no taxes have to be paid[40].

[Rz 15] It becomes clear that virtual currency might face numerous legal provisions and requirements. The legal uncertainty might hinder FinTech start-ups to flourish in Switzerland, as the risk of sanctions due to negligence is still substantial. The FINMA has become aware of the current

33 Gless Sabine/Kugler Peter/Stagno Dario, Was ist Geld? Und warum schützt man es?, recht – Zeitschrift für juristische Weiterbildung und Praxis 2015, p. 82 ss., p. 96.

34 Schären/Dobrauz-Saldapenna (note 2), p. 544.

35 FINMA, Medienmitteilung «Vermögensverwaltung: FINMA-Regeln werden technologieneutral», 1 July 2016 (https://www.finma.ch/de/news/2016/07/20160701-mm-rs-09-01/).

36 FINMA (note 35).

37 FINMA-Rundschreiben 2016/07 «Video- und Online-Identifizierung», 18 March 2016 (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2016-07.pdf?la=de).

38 FINMA-Rundschreiben 2009/1 «Eckwerte zur Vermögensverwaltung», 1 January 2009 (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2009-01.pdf?la=de).

39 FINMA, Faktenblatt Bitcoins (note 13), p. 2.

40 Christoph M. Meier, Bitcoin und Steuerfragen, Expert Focus 9/15, pp. 716–720, p. 719.

problems and has taken steps to adapt regulation to the needs of financial services» technologies. The new approach of the Swiss regulator will be the topic of the next chapter.

3.3. Regulation «Light» and The Sandbox

[Rz 16] In September 2015, Mark Branson, director of FINMA, addressed the problems and challenges that come along with FinTech in depth[41]. He puts emphasis on the aim of FINMA to keep the country competitive when it comes to Switzerland's financial markets and technology[42]. He also stresses that the regulator is concerned to establish a neutrality of technology, permitting also start-up firms to enter the market of well-established financial services. As we have seen above, this aim seems to have been fulfilled as of July 2016[43]. Concerning crowdfunding and virtual currencies, Branson states that these technologies may fall within the scope of the BA and AMLA[44]. The requirements concerning money laundering seem sensible to him since those are easily met; yet, the requirement of a banking licence may be too costly to fulfil, in particular with regard to start-up firms[45]. Indeed, in 2016 , one of the members of the executive board, Rupert Schäfer, announces that the greatest problems within the field of FinTech regulation is to be found under the BA since the licence requirements are daunting to meet[46]. This is also what Branson addressed in his speech in 2014 when he announced the need for a new category within the scope of the BA, so that, when conducting business, FinTech firms meet fewer obstacles[47].

[Rz 17] So, the FINMA mainly focus on the banking licence and the regulatory requirements that come with it. It seeks to address these problems in two ways, namely with a new category under the BA and with the sandbox. The first measurement is the creation of a licence «light» so to speak, so FinTech firms fall under a new category in the BA that requires less than the ordinary banking licence. The second measurement, the sandbox, shall even allow for doing business in the financial services technology sector without any licence at all, as long as certain limits are not trespassed.

3.3.1. Licence Light

[Rz 18] In spring 2016, the regulator introduced a few ideas concerning the «licence light». It was first considered that this licence shall apply to financial innovators that hold less than CHF 50 Mio deposits; the securities shall amount to 5% of the deposits held or cover in any case the sum

41 Mark Branson, Technologischer Wandel und Innovation in der Finanzindustrie, Referat Business Club Zürich, 10 September 2015 (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/20150910-vortrag-fintech-bnm.pdf?la=de); Diana Lafita, GesKR – Gesellschafts- und Kapitalmarktrecht 2015, pp. 532–535, p. 535.

42 Branson (note 41), p. 1.

43 FINMA (note 35).

44 Branson (note 41), p. 5.

45 Branson (note 41), p. 5.

46 Rupert Schäfer, Die FINMA ist fit für Fintech (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/20160913-fit-fuer-fintech-le-temps_de.pdf?la=de), p. 2.

47 Branson (note 41), p. 5.

of CHF 300'000[48]. The Federal Department of Finance even suggests allowing the acceptance of CHF 100 Mio public deposits[49]. These rules could be part of a future licence light category in the BA and BO, a so-called FinTech licence. The Federal Department of Finance also suggested that acceptance of less than CHF 1 Mio public deposits be exempted from the obligation to obtain any kind of licence[50]. So, in addition to the current regime of the banking licence there would be a licence light (or FinTech licence) and no need for licensing if the accepted sums of deposits are considered low (sandbox).

3.3.2. The Sandbox

[Rz 19] At the same time, the regulator introduced the sandbox, that is, an opportunity to do business without any obligation to obtain a licence. It can be seen much like the sandbox we all know from our own childhood, it is a place where things can be tried out, ideas can develop, and innovation meets no boundary. According to the FINMA media announcement, it is considered to make the sandbox available to all market participants who hold less than CHF 200'000 deposits[51]. In November 2016, a media release of the Federal Council spoke of a regulation-free sandbox up to the acceptance of deposits of CHF 1 Mio[52]. As we can see, the debate as to what is the right and reasonable limit for the acceptance of deposits is still going on.

3.4. Summary

[Rz 20] As we have seen, the current law poses several problems to FinTech firms entering the market. Of primary concern is the regulation under the Banking Act and the Banking Ordinance, particularly the acceptance of deposits.

[Rz 21] The Federal Council has at last developed three steps to facilitate the current situation: Firstly, specific regulatory changes such as the change of art. 5 of the Banking Ordinance, so deposits can be held on an account up to 60 days; secondly, the establishment of a sandbox; thirdly, the creation of a licence light, or a FinTech licence[53]. Concerning the further development, it is officially stated in November 2016: «The Federal Council has instructed the FDF to draw up a consultation draft with the required legislative amendments by the start of 2017. Moreover, the FDF should conduct additional clarifications in cooperation with the interested authorities on reducing further barriers to market entry for fintech firms, also those outside financial market law (e.g. legal treatment of virtual currencies and assets).»[54] The regulatory regime for FinTech is therefore not definitely set yet.

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48 FINMA, Medienmitteilung «FINMA baut Hürden für Fintech ab», 17 March 2017 (https://www.finma.ch/de/~/media/finma/dokumente/dokumentencenter/8news/medienmitteilungen/20160317-mm-fintech.pdf?la=de), p. 2; Federal Department of Finance (note 25), p. 3.

49 Federal Department of Finance (note 25), p. 3.

50 Federal Department of Finance (note 25), p. 3.

51 FINMA (note 48), p. 2.

52 Federal Council, Media Release «Federal Council wants to reduce barriers to market entry for fintech firms», 2 November 2016 (https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64356.html).

53 Federal Department of Finance, Media Seminar, 1 November 2016 (https://www.newsd.admin.ch/newsd/message/attachments/45939.pdf), p. 6.

54 Federal Council (note 52).

4. Approaches to Fintech Regulation in the United Kingdom

4.1. Approaches

[Rz 22] In May 2014, Martin Wheatley, then Chief Executive Officer of the British Financial Conduct Authority (hereafter FCA), addressed the «Project Innovate» in his speech at Bloomberg, London[55]. Wheatley stresses the importance of innovation in the financial service system and that innovative approaches must be encouraged. An important instrument to ensure growth in this sector is a level playing field for FinTech firms, fair competition between established players and firms-to-come. In a third point, he addresses the issue of regulation and asks the question whether the FCA does enough to promote technological innovation. As important areas of innovation he mentions, amongst others, crowdfunding and virtual currencies. He finally concludes that the regulator is going to introduce two measures to ensure said aims: hub is going to be established, advising innovators on regulatory issues, and there will be an incubator to support innovative businesses. The hub's function is, according to Wheatley, twofold: innovators shall be advised on compliance issues, so they meet the regulatory standards, and the regulator itself shall seek to detect regulatory issues that need amendment, so FinTech can flourish. The innovation hub started running full time on 28th of October 2014[56]. The regulatory sandbox, or, as Wheatley referred to it in 2014, the incubator, is explained by Christopher Woolard, FCA Director of Strategy and Competition, and was open for application from the 9th of May 2016 onwards[57]. According to Woolard, the sandbox allows for two cohorts of innovative firms per year. He describes the process under the sandbox as follows:

> «We are setting up a tailored authorisation process, which means that sandbox firms will first be authorised with restrictions, allowing them to test their ideas but no more. They still need to apply for authorisation and meet threshold conditions, but critically only for the limited purposes of the sandbox test. So the authorisation tests should be easier to meet and the costs and time to get the test up-and-running reduced.[58]»

[Rz 23] As with Switzerland, one of the main problems is the costly process of authorisation that has a chilling effect on FinTech firms. The establishment of the sandbox shall reduce this.

4.2. Legal Foundation

[Rz 24] The relevant regulation of businesses dealing in financial services can be found in the Financial Services and Markets Act 2000 (hereafter the «Act»). There is also a corresponding order, called the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (hereafter the «Regulated Activities Order»). Furthermore, the FCA has published the Perimeter Guidance Manual (PERG)[59]. The purpose of the PERG is defined under 1.1.2 as follows: «The purpose of

55 Martin Wheatley, Making innovation work for firms and consumers, 29 May 2014 (https://www.fca.org.uk/news/speeches/making-innovation-work-firms-and-consumers).

56 Martin Wheatley, Innovation: The regulatory opportunity, 28 October 2014 (https://www.fca.org.uk/news/speeches/innovation-regulatory-opportunity).

57 Christopher Woolard, Speech at the Innovate Finance Global Summit, 11 April 2016 (https://www.fca.org.uk/news/speeches/innovate-finance-global-summit).

58 Woolard (note 57).

59 See: https://www.handbook.fca.org.uk/handbook/PERG/1/?view=chapter.

this manual is to give guidance about the circumstances in which authorisation is required, or exempt person status is available, including guidance on the activities which are regulated under the Act and the exclusions which are available.»[60] By «Act» and «Regulated Activities Order» the PERG refers to the same legislation as is referred to under the terminology of this paper. In the case a firm wants to apply for the sandbox, it is recommended to consult the PERG before filling in the application form[61]. As we have seen above, this is to receive guidance on the application of the Act as well as the Regulated Activities Order to a particular business situation.

[Rz 25] Chapter II of the Act concerns regulated and prohibited activities, chapter III authorisation and exemption under the Act. I will focus on the regulated activities.

[Rz 26] Any person conducting regulated activities in the UK must be either an authorised person or an exempt person (section 19 para. 1 of the Act). What must be understood by regulated activities is specified in section 22 of the Act. For an activity to be a regulated activity, it must meet following requirements:

[Rz 27] The activity must be conducted as a way of business (section 22 para. 1 of the Act).

[Rz 28] Furthermore, the activity must be of a specified kind (section 22 para. 1 of the Act), that is, it is specified by an order made by the Treasury (section 22 para. 4 of the Act). Also, the activity must relate to a specified investment, or, be a specified activity relating to property. «Specified» is used as in section 22 para. 4 of the Act. This very specification has been made in the Regulated Activities Order (section 4 and following). Art. 5 para. 1 of the Regulated Activities Order then states that accepting deposits is a specified activity if money received by way of deposit is lent to others, or if an activity conducted by a person receiving the deposit is financed wholly, or to a material extent, out of the capital of or interest on money received by way of deposit. A deposit is under art. 5 para. 2 of the Regulated Activities Order a sum of money, other than one excluded by any of articles 6 to 9, paid on terms under which it will be repaid, with or without interest or premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and which are not referable to the provision of property (other than currency) or services or the giving of security. Art. 6-9 of the Regulated Activities Order names the exclusions under which a sum of money is not considered a deposit under this Order and the Act. Art. 6 of the Regulated Activities Order states that sums of money paid by certain persons fall not under deposits. «Certain persons» means mainly governmental, such as the Bank of England, or international institutions, such as the European Investment Bank, all of which are listed in detail in art. 6. Furthermore, sums received by solicitors and persons authorised to deal are considered exceptions (art. 7 and 8 of the Regulated Activities Order). Also, sums received in consideration for the issue of debt securities are exempted (art. 9 of the Regulated Activities Order). What is set forth in the Regulated Activities Order is further specified in the PERG 2.7. The exclusions are dealt in PERG 2.8 and 2.9. With regard to crowdfunding and virtual currency, the regulation of accepting deposits as well as issuing electronic money might be relevant. As stated in PERG 2.7.2A, the issuance of electronic money is also a regulated activity. PERG 2.6.4.A refers to article 74A of the Regulated Activities Order.

60 https://www.handbook.fca.org.uk/handbook/PERG/1/?view=chapter.

61 At the bottom: https://www.fca.org.uk/firms/project-innovate-innovation-hub/regulatory-sandbox#cohort1.

4.3. Summary

[Rz 29] As we have seen, the UK also considers crowdfunding and virtual currencies as an important issue that needs to be addressed. The main approaches are the establishment of a hub to provide FinTech firms with advice concerning the regulatory issues as well as the creation of a sandbox. As special kind of licence, as it is going to be established in Switzerland, is not mentioned so far. The regulatory rules of the Financial Services and Markets Act 2000, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, and the Perimeter Guidance Manual are extensive and difficult to overview, so the establishment of a hub is certainly a much needed instrument to encourage FinTech firms to do business in the UK.

5. Australian Regulation of FinTech

[Rz 30] Also Australia has taken steps to evaluate and improve the development of FinTech. Regulators engaging with FinTech in Australia are namely the ASIC (Australian Securities and Investments Commission), APRA (Australian Prudential Regulation Authority), RBA (Reserve Bank of Australia), the Attorney-General's Department, and AUTRAC (Australian Transaction Reports and Analysis Centre)[62].

[Rz 31] In 2016, the Australian Government issued a report on «Backing Australian FinTech»[63]. FinTech is seen as a development that comes along with a stimulation of competition. A benefit for the public at large is ascribed to new approaches like, amongst others, crowdfunding, mobile payment, and digital currencies[64]. The benefits are considered rather grand: «FinTech solutions hold enormous potential benefits to all business, especially new and existing small businesses.»[65], or, «The frictionless operation of FinTech innovations such as Blockchain and digital currencies are generating new value streams not just in financial services but across the economy.»[66], also, «Growing our FinTech industry will help Australia maintain and build on our existing comparative advantages as a regional financial centre and provider to key regional markets.»[67], as well as, «The Government recognises Australia's FinTech sector can play a vital role in aiding the positive transition that is occurring in our national economy.»[68] Having said that, it is not surprising that the Government has decided to work closely together with the FinTech industry to ensure Australia grows an internationally competitive environment for FinTech firms[69]. To ensure the growth of FinTech in Australia, the Government has established a FinTech Advisory Group to advise the Treasurer directly. It is the aim of the Advisory Group to explore technologies such as blockchain, digital currencies, and crowdfunding[70].

62 Australian Government, Report «Backing Australian FinTech», 21 March 2016 (http://fintech.treasury.gov.au/files/2016/03/Fintech-March-2016-v3.pdf), p. 29 ss.

63 Australian Government (note 62).

64 Australian Government (note 62), p. 10.

65 Australian Government (note 62), p. 12.

66 Australian Government (note 62), p. 13.

67 Australian Government (note 62), p. 16.

68 Australian Government (note 62), p. 13.

69 Australian Government (note 62), p. 15.

70 Australian Government (note 62), p. 15.

5.1. Crowdfunding in Australia

[Rz 32] The Parliament of Australia is currently amending the Corporations Act 2001 (hereafter CA 2001) to facilitate crowd-sourced funding[71]. The text of bill has passed through the House of Representatives but is still pending at the Senate. The text of bill of the first reading at the House of Representatives as well as an explanatory memorandum are available online[72]. Chapter 8 of the explanatory memorandum gives an overview of the amendments to be made concerning the Australian Market Licence (AML) since the AML is still an obstacle to crowdfunding technology. The new law concerns mainly the power of exemption from the obligation to obtain the AML, which is exerted by the Minister[73]. By the new law that is introduced by the amendment, the Minister can also partly exempt market participants from the obligation to obtain a licence.

5.2. Regulatory Sandbox

[Rz 33] As well as the UK regulator the Australian Government and ASIC have been working on the creation of a regulatory sandbox[74]. As of 15th of December 2016, the regulatory sandbox is open for business[75]. As the Treasurer announced in his press release the costs of regulatory licensing and the time to get FinTech services to market will be reduced. The ASIC becomes more explicit in their Regulatory Guide 257 (RG 257), entitled «Testing fintech products and services without holding an AFS or credit licence'[76]. In RG 257.71 it is stated that a FinTech license exemption can be granted up to 12 months as this is considered a sufficient amount of time to test a new business model. However, according to RG 257.123 (a) an individual prolongation is possible. The licensing exemption is further specified in RG 257.82 and following. Special rules concerning client limits, exposure limits, consumer protection measures, adequate compensation arrangements, and dispute resolution are introduced.

5.3. Cryptocurrency

[Rz 34] According to the Australian Taxation Office (ATO), cryptocurrencies such as Bitcoin are considered property and dealing with it is considered barter with similar taxation consequences[77]. Latter applies when Bitcoins are received in return for goods and services, so consequently, there is a Goods and Services Tax (GST) to be paid[78]. However, it is part of the Government's plan

71 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5766.

72 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5766.

73 Memorandum on Corporations Amendment (Crowd-Sourced Funding) Bill 2016 (http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5766_ems_c3332e6c-db63-4bd9-9e75-c1e59e31266e/upload_pdf/605980.pdf;fileType=application%2Fpdf), p. 95 s.

74 Australian Government (note 62), p. 20.

75 The Treasury, Media Release «Launch of an innovative regulatory sandbox for Fintech», 15 December 2016 (http://sjm.ministers.treasury.gov.au/media-release/133-2016/).

76 Regulatory Guide 257, Testing fintech products and services without holding an AFS or credit licence, issued by ASIC in December 2016 (http://download.asic.gov.au/media/4111792/rg257-published-15-december-2016.pdf).

77 https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia—specifically-bitcoin/?page=1#Summary.

78 https://www.business.gov.au/info/run/finance-and-accounting/accounting/payments-and-invoicing/bitcoin-for-businesses-digital-currency-guide.

to reduce barriers for FinTech that digital money be treated as money for GST purposes, and it is also mentioned in the report on FinTech that anti-money laundering laws should apply to digital currencies[79]. This means that the *A New Tax System (Goods and Services Tax) Act 1999* as well as the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* need to be amended. As of yet, these changes have not been implemented.

6. Analysis and Comparison

[Rz 35] In all three countries, the United Kingdom, Australia, and Switzerland, regulatory officials and the Government are convinced that FinTech will have a substantial impact on the economy. Topics mentioned in all three countries are the issue of competition and the ability to attract FinTech firms and provide them with a legal framework that is technology-friendly.

6.1. The Sandbox

[Rz 36] London's regulator has been first to introduce the regulatory sandbox, which happened in May 2016. In December 2016, the Australian Sandbox was declared open for businesses. In Switzerland, the sandbox is still to be established. The aim of the sandboxes is in principal in all three countries the same: the reduction of unnecessary regulation for FinTech firms, so their business can foster without being subject to costly and complicated regulatory issues. In this sense, the sandbox is indeed an incubator for FinTech firms.

[Rz 37] Personally, I think a sandbox should be open to FinTech firms for more than 12 months. The British regulator offers the possibility to prolong the test phase, but one must keep in mind that the required approval of prolongation will have a chilling effect on businesses and puts them under serious pressure to perform well and quickly. The Swiss sandbox is not yet developed in detail. Yet I would suggest setting the time limit to three years as this offers enough freedom to launch a project and evaluate the success continuously. No time limit at all seems to be counter-productive since this might lead to an accumulation of FinTech firms under sandbox conditions. After all, the sandbox is the most flexible instrument to encourage FinTech firms to come to Switzerland and allows them a maximum of regulatory freedom. Nevertheless, the aim must be to survive under «real», non-sandbox, conditions and to become licenced. Furthermore, a three-year limit will encourage firms to launch their business under realistic time conditions. So, a time limit may also be an impetus to perform well whereas a too short time limit might rather have a chilling effect.

6.2. Cryptocurrency

[Rz 38] In Switzerland, cryptocurrency is seen as a marginal phenomenon, and it has therefore not been explicitly regulated[80]. In Australia, cryptocurrency is seen as property and dealing with

79 Australian Government (note 62), pp. 22, 27; the intention of the Australian Government to take virtual currencies into consideration when it comes to anti-money laundering laws was already an issue an the Swiss report on virtual currencies from 2014: Bericht des Bundesrates (note 12), p. 25.

80 Bericht des Bundesrates (note 12).

it is thus considered barter. As we have seen, efforts are being made to exempt cryptocurrency from the GST regime that is currently applied. In the UK, cryptocurrency is being tested under the sandbox conditions[81], and other than in Australia, cryptocurrency is not subject to taxation (VAT)[82].

[Rz 39] As seen in the UK, cryptocurrency can be tested under sandbox-conditions. In line with the Swiss Federal Council I think cryptocurrency is still a marginal phenomenon and the conditions found under the sandbox, once established, will be sufficient to meet the requirements of this restricted market.

6.3. The Licence

[Rz 40] The Swiss licence is a unique concept so far. The Swiss Federal Council has also highlighted this in his statement: «The creation of a fintech licence is also pioneering by international standards.»[83] The British regulator offers no special kind of licence for FinTech firms but a regulatory exemption from licensing under the regime of the sandbox; the same applies to Australia. Switzerland is trying to develop a novel mechanism to facilitate the access to business for FinTech firms. However, the need for a licence was also due to anachronistic concepts in banking regulation that mainly focus on the number of deposits received and not on the amount of capital. The precise concept of the licence will have to be established in the process of legislation that is yet to come, but as we have seen, the number of deposits as a crucial factor shall be eradicated.

[Rz 41] The introduction of a FinTech license seems, to me personally, one of the most efficient instruments to help FinTech firms to grow and flourish. This is because a license still creates trust in the licensee and his business. Trust is particularly needed when a new form of business is launched or old established players on the market are challenged by start-ups. The security regime is based on a fixed amount (CHF 300'000) and on a 5% rule (5% of the held deposits). Since the suggested amount of acceptable deposits ranges from CHF 1 Mio to CHF 100 Mio, the minimum security is CHF 300'000, the maximum, however, CHF 5 Mio. If we applied the 5% rule also to the minimum amount of deposits, the minimum security would be CHF 50'000. This means that FinTech firms who accept deposits up to CHF 6 Mio have a higher security burden than those accepting more, at least in terms of percentage. Since the general amount of securities from CHF 6 Mio to CHF 100 Mio deposits would be 5% I think it would be appropriate to reduce at least the minimum security from CHF 300'000 to CHF 150'000. Otherwise, those surpassing CHF 1 Mio securities have a security burden of 33% whereas those with more than CHF 6 Mio have only 5%.

81 Ian Allison, Blockchain remittances tested in FCA sandbox, International Business Times Online, 11 November 2016 (http://www.ibtimes.co.uk/uk-regulator-fca-testing-bitcoin-remittances-1590270); Caroline Binham/Madhumita Murgia, FCA considers approving blockchain businesses, Financial Times Online, 21 August 2016 (https://www.ft.com/content/8ab3c696-6634-11e6-8310-ecf0bddad227).

82 British Government, Policy paper «Revenue and Customs Brief: Bitcoin and other cryptocurrencies», 9 March 2014 (https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies).

83 Federal Council (note 52).

7. Conclusion

[Rz 42] In all three countries, efforts are being made to facilitate the current situation of FinTech firms with regards to market access, costs, and regulatory requirements. So, there is mainly a FinTech-friendly atmosphere to be found that seeks to attract FinTech firms. I think this is due to the importance of financial services in all three countries. The regulator does not want to frighten FinTech firms away by strict regulatory regimes but seeks to attract firms by facilitating the regulatory framework. Interestingly, all three regulators have taken similar steps to ensure a FinTech-friendly atmosphere in their country. The main instruments are the creation of a regulatory sandbox, an incubator, which allows FinTech firms to develop their business without regulation as long as a limited amount of money is involved. We have seen that hubs have evolved, assisting FinTech firms in complying with the regulatory rules. Switzerland is currently also establishing a FinTech licence which shall help to overcome the problems caused by the traditional banking licence. Since Swiss banking law is still focusing on the number of deposits received and not on the actual amount of money taken as deposits FinTech firms fall too easily under banking regulation and have to comply with strict regulation standards. This shall be changed in 2017, so FinTech firms face a new category, a new licence, under Swiss banking law. Since the British regulator has been testing the sandbox already it could be helpful for the FINMA to communicate with their British equivalent so they can profit from the experiences that have been made so far. I would also like to suggest to also analyse the concept of deposits under the Swiss banking act. A novel approach could be the development of a positive definition of *deposits* instead of a negative definition.

[Rz 43] Concerning cryptocurrency, although the changes might be as we have seen severe it is yet too early to take any legal steps to regulate it. As we have seen, opinions are very diverse in regards to the future development of such currencies and there are also inherent limitations to it, such as the process of mining that requires much electricity. One may also consider the hyping effect of the financial crisis in 2007/8 that might have lead to a overoptimistic view on cryptocurrency. I think it is a pragmatic, and therefore also very Swiss, attitude to wait and observe the further development of cryptocurrencies. If there really should be need for action steps will certainly be undertaken. However, where we are in dire need of legal changes we must not dither for too long. So, I welcome the determination to create a FinTech licence and with it the enhanced possibility to crowdfund projects in Switzerland.

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