



INTERNATIONAL ASSOCIATION  
OF YOUNG LAWYERS

## FOCUS ON FINTECH

Commission(s) in charge of the Session/Workshop:

**BANKING, FINANCE AND CAPITAL MARKETS**

**TOKYO, 2017**

### **National Report of Switzerland**

Benjamin Dürig

FRORIEP Legal AG  
Bellerivestrasse 201  
8034 Switzerland  
+41 (0)44 386 60 00  
[bduerig@fropiep.ch](mailto:bduerig@fropiep.ch)

Jennifer Maxwell  
Blake, Cassels & Graydon LLP  
London, England

Gerard Correig  
Cuatrecasas  
Barcelona, Spain

Natalia Danilova  
ALRUD  
Moscow, Russia

1. Are digital currencies frequently used in your country? Is there any regulation implemented with respect to digital currencies? Are they recognized or directly prohibited by the local law? What are the spheres where digital currency is used? Is it possible to use digital currencies in commercial transactions? Has your local central bank or any other governmental institution considered establishing state digital currency?

Digital currencies are in use in Switzerland. However, for the time being, their economic importance is marginal. The most important digital currency, Bitcoin, had a trade volume of approx. CHF 1,4 million in 2016 according to <http://bitcoincharts.com>. Bitcoin is currently accepted by around 150 businesses in Switzerland according to <http://coinmap.org>, ranging from restaurants, hotels and retailers to service providers, traders etc. One might assume that most of these businesses are, for the time being at least, accepting Bitcoin to demonstrate their open-mindedness towards technological developments rather than for economic reasons. The same is true for the Swiss Federal Railways, which are accepting Bitcoin payments for train ticket sales, as well as the city of Zug which, as the first public entity to do so worldwide, has been accepting Bitcoins for payments of public fees for up to an amount of CHF 200 since 1 July 2016. This has promptly earned the city the "sexy" label of "Crypto Valley" and generated an impressive buzz in media around the globe.

From a legal perspective, digital currencies are not recognised currencies, meaning that no one is obliged to accept payment in digital currencies against their will. It is up to the parties of a contract to decide whether or not to accept payment in a digital currency. The use of digital currencies as a payment method for the purchase of goods and services is not regulated specifically under Swiss law.

From a regulatory point of view, digital currencies are treated as financial assets. Therefore, some activities involving digital currencies may be subject to a bank licence and anti-money laundering regulations, in particular if they involve accepting deposits or the acceptance of (official or digital) currencies by a trader on an account owned by such trader in order to use them for subsequent exchange transactions. The same is true for online trading platforms if they are not limited to facilitating transactions or matching parties, but involve the processing of payment transactions by accepting official or digital currencies on accounts owned by the platform operator. Although not subject to a bank licence, the transmitting or exchange of official or digital currencies by professional financial intermediaries is subject to anti-money laundering regulations such as KYC requirements.

The difficulties that both service providers and authorities face when applying existing regulations to business models involving digital currencies can be

illustrated with the example of Bitcoin wallet provider Xapo, who announced in 2015 that it was transferring its non-U.S. business to Switzerland. It took the Swiss regulator FINMA two years to decide to qualify Bitcoins as "objects" (as opposed to mere claims towards the service provider, as is the case for deposit money). This means that in case of a bankruptcy of Xapo, the Bitcoin owners will be able to segregate their Bitcoins from the bankruptcy estate and, therefore, no customer protection in the form of strict equity capital requirements is necessary. The result is that Xapo does not have to obtain a bank licence. It is, however, subject to AML-regulations and will have to join a self-regulatory organisation recognised by FINMA.

If digital currencies are used to obstruct the identification of the origin, the tracing or the forfeiture of assets which originate from a felony or aggravated tax misdemeanour, this may constitute money laundering pursuant to the Swiss Criminal Code and be subject to criminal sanctions. As digital currencies are financial assets, they can be the object of offences against property such as misappropriation, fraud, extortion, unauthorised access to data processing systems etc.

To our knowledge, the Swiss National Bank is not considering establishing state digital currency.

2. Currently, blockchain is considered to be a cheap and generally attractive option for financial services business as compared to bitcoin. Please share your opinion whether this is true for your local financial market players. How does your country plan to introduce blockchain technology into the financial system?

Blockchain has been the buzzword in the FinTech industry in the past 24 months. It is, in my opinion, too early to tell whether this is a temporary hype or a real game changer to the financial industry, making central counterparties, clearing systems and even "traditional" banks obsolete.

In November 2016, the Federal Department of Finance issued a position paper containing specific proposals to reduce market entry barriers for FinTech enterprises (including those developing blockchain technology) and, in February 2017, the Federal Council opened a consultation on draft amendments to the Federal Banking Act and the Federal Banking Ordinance implementing these proposals.

The three pillars in order to reach this goal are:

- i. the extension of an existing exemption from the bank licence requirement for settlement accounts which would allow platforms and traders to keep funds on their own accounts for up to 60 days (as opposed to 7 days currently) without being subject to a bank licence;
- ii. the introduction of a threshold of CHF 1 million for the acceptance of deposits without being subject to a bank licence (so-called sandbox). Currently, there is no monetary threshold and everyone accepting more than 20 deposits at a time or publicly offering to take deposits is deemed to be a bank;
- iii. the introduction of a so-called FinTech licence for FinTech companies falling into the scope of the Federal Bank Act without carrying out the core business of a bank (lending business with maturity transformation) up to a deposit threshold of CHF 100 million, such licence being subject to less onerous requirements than a regular bank licence. FINMA may, on a case to case basis, grant FinTech licences to companies operating above this cap and the Federal Council shall be entitled to amend the cap as such if necessary.

The extension of the deadline for settlement accounts and the regulatory sandbox regime entered into force on 1 August 2017. It remains to be seen if and how the above measures will improve the development of local FinTech companies and/or attract foreign players in the FinTech sector.

3. Please describe the level of mobile wallets' integration in your country. Has your jurisdiction adopted (or plans to adopt) regulations to reduce fraud and privacy risks connected with mobile wallets? Does biometrics have a role to play in your jurisdiction as a method of secure payments?

Mobile wallets have been introduced in Switzerland relatively recently. By end of 2016, there were five big local players (Paymit and Twint – which are supposed to merge this year, PostFinance App, SwissWallet and Migros App) along with a few others. The only international provider that has entered the market in 2016 was Apple Pay, but some other outfits such as Alipay, Samsung Pay, Android Pay or IBM Pay have made or are about to make a move into Switzerland.

As far as we are aware there are no specific regulations (yet) planned with regard to the reduction of fraud or privacy risks in this regard.

Biometrics is one method, along with others such as tokenisation and cryptography, that is used by certain providers in order to secure customer data.

4. Currently financial markets are trying to address customers' interest in adoption of mobile payments, especially through the use of Near Field Communication (NFC). Are your local merchants switching to NFC-enabled technologies? Do you believe that this is a win-win scheme for both customers and merchants?

Some of the providers mentioned under 3 above offer NFC-enabled technology for their mobile wallets. However, as Apple has blocked the NFC-interface integrated in iPhones, this technology is only available for iPhone owners using the Apple Pay wallet. Apple's iPhone having a market share of approx. 50% of the Swiss smartphone market, the other wallet providers still have to work with technologies such as beacons, Bluetooth and QR codes. There have been rumours that Apple might, at least partially, lift this blockade with the release of its new iOS 11 which is due for mid-September 2017.

The Swiss consumer protection foundation has asked the competition commission (ComCo) to investigate this conduct from a competition law perspective. However, it is not clear whether ComCo has actually initiated such proceedings.

In the meantime, some of the major credit card issuers and banks which hold interests in some of the other mobile wallet providers do not allow the use of Apple Pay with their credit cards. However, it appears that a mobile app was launched in order to bypass this "ban" by creating "virtual credit cards" that can be used with Apple Pay and "loaded" with money from "banned" credit cards...

I personally believe that mobile payment is the future and, in the long run, it will replace cash transactions. However, it will take a lot of time to get one and all users accustomed to the new technology so I expect to see traditional payment methods such as cash, debit and credit cards alongside mobile wallets for many years to come.

5. Internet banking is popular now with bank clients. Larger banks are developing constantly in this sphere by providing a number of new banking services through mobile platforms. What are some recent developments in your jurisdiction and how are legal frameworks changing to help?

In March 2016, the Swiss Financial Market Supervisory Authority FINMA issued "Circular 2016/7" which sets out the anti-money laundering due diligence requirements for client onboarding through digital channels.

The circular states that, subject to certain conditions, financial intermediaries may onboard clients via video transmission. Other forms of online identification are possible as well, as an electronic confirmation of the authenticity of the client's ID

is now recognised without requiring in-person identification at the financial intermediary's place of business, provided that the electronic documents are in one of the forms set out in the circular.

Furthermore, the declaration of beneficial ownership no longer requires a handwritten signature but may be submitted electronically.

The circular being "technology neutral" should still facilitate digital business, provided that the requirements set out in the circular can be implemented in a user friendly manner. It certainly is another step towards "real" internet banking without any media break.

6. There is a belief that fintech startups are putting banks under pressure. Is this statement true for your country? Do you believe that fintech startups could force the traditional banks out of the local market in the near future?

For the time being, the traditional banks are not forced out of the local market by FinTech start-ups. Quite the opposite is true: We see traditional banks investing in FinTech start-ups and by doing so, save them from financial distress. As an example, the Basellandschaftliche Kantonalbank (BLKB) has recently acquired a stake in Switzerland's first independent robo advisor, True Wealth.

In my opinion, the real question is whether the traditional banks are flexible enough to "take the bull by the horns" and to participate from the very start in FinTech trends that have the potential to threaten their business model. In a way, they are predestined to be at the forefront of FinTech innovation as they do not, like FinTech start-ups, need to try and avoid having to obtain a bank licence; they already have it. Along with this, they have the manpower and know how to guarantee regulatory compliance. Therefore, they are (relatively) free to embrace new technologies without always fearing the intervention of the regulatory watchdog.

By investing in early stage FinTech enterprises, traditional financial services providers can use the new technologies as a real add-on to their existing business model, generating added value for their customers, e.g. in the form of mobile apps.

7. Currently certain countries have or are developing national payment systems. What are the main reasons for local national payment system development in your country (e.g. political reasons, internal safety promotion, etc.)? Are national payment systems competitive compared to commercial systems present in your local market? Does your local legislation regime provide for special treatment for national payment systems of other countries?

In principle, Switzerland does not have an exclusive national payment system.

However, the Swiss National Bank (SNB) is obliged by the National Bank Act, amongst other tasks, to facilitate and secure the functioning of cashless payment systems in Switzerland. For this purpose, the SNB acts as system manager for the Swiss Interbank Clearing (SIC) system, which is operated by SIX Interbank Clearing Ltd on behalf of the SNB and processes both large-value payments and retail transfers. Therefore, SIX Interbank Clearing Ltd happens to be *de facto* the national payment system of Switzerland.

Payment systems of other countries are not entitled to a special treatment under Swiss law. However, the SNB supervises systemically relevant foreign payment systems provided that they have substantial parts of their operations or significant participants in Switzerland or if they clear or settle significant transaction volumes in Swiss francs. For this purpose, the SNB may, amongst others, cooperate with foreign supervisory authorities.