

International Briefings

Authorised firms would also have to pay an annual supervisory fee of €3,210 and an application fee of €1,600.

According to Chapter 3, s 2 of the ISA, the FIN-FSA must process an authorisation application within six months of receiving the application. If the application is incomplete, the six months will be calculated from the date on which the applicant has provided all necessary documents and information.

SCOPE OF THE AUTHORISATION

The authorisation to provide services is limited to eligible counterparties and professional investors as defined in Annex II, s I of the MiFID II. Services could not be provided to retail clients who do not qualify as professionals. As the new provision specifically refers to Annex II, s I of the MiFID II, this would suggest that services could not be provided to so-called “opt-up clients”, ie retail clients who request to be treated as professionals in accordance with Annex II, s II of the MiFID. The services would only concern investment services, and not cover activities related to, eg banking or insurance, or the investment services provided by managers of alternative investment firms (AIFMs).

FINAL REMARKS

The new cross-border authorisation regime will offer banks and investment service firms from non-EEA countries a less burdensome channel to access Finnish markets, and to provide services to Finnish institutional investors. At the same time, Finnish institutional investors will gain enhanced access to a broader range of service providers, providing them with a better ability to diversify their risk and choose the most competitive service provider. ■

Switzerland

Authors Dr Yves Mauchle is an attorney-at-law and Jan Lusti is a trainee lawyer at Baker McKenzie Zurich.

Email: yves.mauchle@bakermckenzie.com and jan.lusti@bakermckenzie.com

THE NEW SWISS FINTECH LICENCE

BACKGROUND: BROAD SCOPE OF SWISS BANKING REGULATION

Until recently, the commercial acceptance of public deposits in any form generally required a banking licence from the Swiss Financial Market Supervisory Authority (FINMA). As in other countries, the banking licence is quite onerous in terms of minimum capital requirements, compliance and organisational aspects and not usually achievable for younger firms.

The Swiss banking licence is tailored to specific business models with a high-risk potential from the point of view of customer protection and financial stability. In the typical banking business,

maturities are transformed by accepting short-term deposits (deposit-taking business) and granting some or all of these funds as long-term loans (lending business) – banks “borrow short to lend long”. The aim of the conventional Swiss banking regulation is to reduce the risks inherent in this core banking business.

This regulatory approach does not cater for emerging fintech businesses. This is the case particularly in relation to certain blockchain or distributed ledger technology-based business models. Under previous Swiss banking law, these models would to a large extent have fallen within the scope of the Banking Act and would therefore have required a banking licence, even if these businesses did not conduct core banking activities.

In 2017, the Swiss Federal Council and the Swiss Federal Department of Finance (FDF) acknowledged that the financial industry is in a state of transformation. An initiative including three measures to promote innovation in the financial sector and to reduce barriers to market entry for fintech companies was launched. The aim was firstly to extend the permissible holding period for settlement accounts in connection with crowdfunding and secondly to create a licence-free innovation space, the “Sandbox”.¹ In addition, the Federal Council proposed to include a new licence category in the Banking Act with simplified requirements. In particular, this would allow younger companies and especially fintech firms to accept public deposits of up to CHF100m on a commercial basis.

On 1 January 2019, the new provisions in the Swiss Banking Act and Banking Ordinance entered into force. They set out a new prudential licence category, often dubbed the “innovator licence” or “Fintech Licence”. According to Art 1b of the Swiss Banking Act, persons holding this licence (Licensees) are entitled to accept deposits under certain conditions and with certain limitations.

THE NEW FINTECH LICENCE CATEGORY

Purpose and scope

The Fintech Licence primarily aims at lowering the market entry barriers for fintech companies that do not conduct activities within the core banking business. The previous regulatory framework represented an unnecessarily high barrier to market entry in many cases and restrained innovation, which affected the competitiveness and attractiveness of the Swiss financial market.

The scope of the new licence category is broadly worded and generally applies to all “persons working primarily in the financial sector”. Despite this wide scope, the focus is clearly on innovative fintech business models. Licensees have the right to accept public deposits up to a maximum of CHF100m on a commercial basis. The operation of a lending or investment business remains reserved for licensed banks. Licensees are not permitted to invest or pay interest on the deposits received.

Requirements

Overview

The Banking Act sets out that the requirements for banks apply to the new Licensees *mutatis mutandis*. Therefore, Licensees must

meet certain requirements with regard to their organisation, risk management, compliance and financial resources. The requirements for the Fintech Licence are detailed in the revised Banking Ordinance. Compliance with these provisions is verified by FINMA as part of its ongoing supervision. FINMA is also responsible for enforcements in case of non-compliance.

Commercial acceptance of deposits as nexus of the Fintech Licence

In general, the acceptance of public deposits only requires a licence if it is made on a commercial basis. The revised Banking Ordinance defines “non-commercial” as accepting less than 20 public deposits or accepting less than CHF1m while not conducting the bank-typical interest rate differential business. No additional criteria are set out in the Banking Ordinance. The acceptance of more than 20 deposits totaling over CHF1m by fintech firms is generally considered commercial, even if the deposits neither carry interest nor are invested. Accordingly, a Fintech Licence (or a Banking Licence) is required for the acceptance of deposits in excess of CHF1m.

Custody of deposits

Licenses are primarily obliged to either forward the accepted deposits in accordance with the respective agreements with the customers or, if this is not the purpose of the agreements or not possible, to repay them. However, if a (re-)transfer according to the respective agreements is not possible or not provided for, the company may keep the deposits in custody. The holding of deposits is not subject to any time limits, but to certain conditions. If deposits are held, they must be administered in the interest of customers and may not be invested or accrue interest during this period. Therefore, Licenses are prohibited from conducting the deposit and loan business reserved for banks and from generating profits from the differential in interest rates. The prohibition of reinvestment furthermore means that the deposits may not be used to purchase yielding assets, whether in one's own name and account or in the context of a collective investment.

As long as the deposits received from the public are not forwarded as intended or repaid to the customers, they must be either kept separate from the funds of the Licensee or they must be recorded in the Licensee's accounts in such a way that they are separable from its own funds at all times. The deposits received have to be kept in custody in such a manner that the risks for the customers are largely excluded until the deposits are forwarded or repaid. The deposits in custody must also be held in a liquid manner, so that they can be forwarded or refunded within a reasonable period of time. Alternatively, the regulations permit the holding of the deposits as Category 1 High-Quality Liquid Assets (HQLA) within the meaning of Art 15a of the Liquidity Ordinance. However, this would require the Licensee to have a current account with the Swiss National Bank (SNB) and to be admitted to the Swiss Interbank Clearing (SIC) payment system.

Duty to inform customers

Licenses may offer a wide range of services. In order for potential

depositors to be able to assess the risks of the business, they need to be informed about the business model. Accordingly, Licenses must thoroughly assess the risks associated with their business model as well as the technology used and communicate the result of this assessment to their customers. The business model must be described in plain language. All the risks of the business model must be described and information regarding specific risks must be fully disclosed.

In contrast to banks, Licenses have been exempted from having to join the Swiss deposit guarantee scheme. However, customers must be made aware of the lack of deposit protection in an appropriate manner. Licenses are free to choose the manner in which they inform their customers, as long as this is not done by way of small print or merely in the general terms and conditions.

Management

Licenses must effectively be managed from Switzerland. Accordingly, the persons entrusted with the management must also be resident in a place from which they can effectively perform their management tasks. Like banks, Licenses must also appoint a corporate body responsible for ultimate supervision and control if this is required by the business purpose or scope of business. However, compared to banks, these requirements are more lenient. FINMA has the authority to grant exceptions and impose additional conditions.

Compliance, risk management and conflict of interest

Licenses have to ensure that the laws and regulatory requirements are complied with and that the effective identification, assessment, management and monitoring of the risks associated with their business (risk management) as well as an effective internal control system are in place. An internal control system is generally structured through a “three lines of defense” approach. The compliance and risk management aspects have to be documented internally and the respective body responsible for the compliance and risk management has to be independent from the profit-orientated business unit. Further, conflicts of interest are regulated in the Financial Services Act, which is set to enter into force on 1 January 2020. These rules will have to be observed by all financial service providers.

Minimum capital requirements

Licenses are subject to capital adequacy requirements. The purpose of the minimum capital rules is not only to ensure a certain level of loss-absorbency for the deposits, but also to ensure that the company can finance adequate organisational and technical measures to conduct its business properly. The qualitative and quantitative capital requirements are significantly less strict for Licenses as compared to the requirements for banks. The capital requirements are set in accordance with the amount of public deposits received. Licenses must at all times maintain capital amounting to 3% of these deposits, but in any case, not less than CHF 300,000. FINMA has the authority to increase the required minimum capital in individual cases where this appears advisable due to increased risks.

International Briefings

THE NEW FINTECH LICENCE IN PRACTICE

International Comparison

It is anticipated that the revised framework will create favourable conditions for Switzerland to compete with jurisdictions such as the UK, Singapore and Hong Kong, which have also modified their regulations in order to attract innovative fintech businesses. While the approach taken by the Swiss regulator differs significantly from other jurisdictions, the Fintech Licence can be an attractive option for fintech firms, such as payment providers. Naturally, the attractiveness of Switzerland as a place of business also depends on other factors such as the tax environment, which can be described as generally favourable.

Application process

The process of obtaining a Fintech Licence is expected to take significantly less than six months to complete, subject to the quality of the application, the complexity of the business model and potential staffing constraints at FINMA. For comparison, an applicant for a banking licence will be subject to onerous capital, liquidity and organisational requirements and an application will take at least six to nine months, and quite probably longer.

Possibilities for licensed banks

The revised Banking Ordinance may still provide space for banks to advance into the fintech sector by making use of the alleviations provided to Licensees. As the total of accepted deposits is calculated on a consolidated basis, most traditional banking institutions will exceed the CHF100m threshold by far. However, provided that the fintech company affiliated with the bank is manifestly independent from the banking group's other business, exceptions from the consolidated view of deposits can be granted by FINMA. From our point of view, the hurdles for the exception from the consolidated view should not be set too high in order to ensure a level playing field and to promote competition.

Potential of the Fintech Licence for specific use cases in the blockchain space

Fintech Licensees may not only accept fiat currencies but also cryptocurrencies such as Bitcoin and Ether. However, according to the practice of FINMA, credit resulting from the acceptance and safe custody of cryptocurrencies that are directly held by individual customers on the blockchain at all times (and not in the company's own accounts) are generally not regarded as deposits. An example for this is wallet providers. Generally speaking, coins in a wallet are not deposits taken by the wallet provider if the power to dispose of them remains with the customer at all times, even in the insolvency of the

wallet provider. Such acceptance and safekeeping of cryptocurrencies can, therefore, be made irrespective of having a Fintech Licence or banking licence. Furthermore, companies with a Fintech Licence are generally free to keep tokens qualifying as securities in custody for clients without requiring an additional licence as a securities dealer or investment firm for the pure safekeeping of such security tokens. Therefore, not all contact with (crypto-) currencies or other blockchain-based assets of customers requires a licence.

In the past, companies considering an initial coin offering (ICO) usually had to take into account that they could fall under the regulations of the Banking Act and had to take precautions in order to steer clear of the licensed area under the Banking Act. Now companies envisaging an ICO might also consider obtaining a Fintech Licence in order to streamline the ICO process. However, the attractiveness of the new Fintech Licence in connection with ICOs still has to be shown in practice and will strongly depend on the business model pursued by the ICO organiser.

With regard to the trading of asset tokens on the secondary market, Licensees can also be admitted as participants in licensed trading infrastructures if they meet the requirements set out in the Financial Market Infrastructure Act. Furthermore, the Federal Council intends to examine in due course whether the operation of an organised trading system should also be opened up to Licensees. However, the Federal Council has advocated a new licence category for a blockchain-based trading platform to which retail customers should have access as well, which could render the discussion obsolete.

OPEN ISSUES AND OUTLOOK

As a general conclusion, the regime of the new Fintech Licence currently appears sufficiently flexible to be able to react appropriately to future developments. However, the suitability and attractiveness of the new category for blockchain-based business models will only become apparent once this new licence category has been put to the test and certain practices of FINMA are established. It will be necessary to monitor carefully whether the framework conditions for the Fintech Licence take market developments sufficiently into account and whether there is a need for further regulation. Furthermore, the regulations should stay flexible to allow amendments where necessary – only the future will tell whether the Fintech Licence in its present form can establish the desired level playing field in the area of fintech firms. ■

¹ These amendments are discussed in detail by Anette Waygood-Weiner/ Yves Mauchle, *International Briefings: Switzerland, 'Swiss Fintech Regulation on the Move'*, *Butterworths Journal of International Banking and Financial Law*, May issue – (2017) 5 JIBFL 329 *et seq.*