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In a nutshell

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Information series on new financial legislation Part 1: FINTECH Regulation

Introduction

On 15th June 2018 the National Council and the Council of States approved the Financial Services Act (FIDLEG) and the Financial Institutions Act (FINIG). After expiry of the three-month referendum deadline, the Federal Council will decide whether or not it will be adopted. At present it is not expected that the referendum will be held, meaning the first part will probably enter into force on 1st January 2019 (Fintech draft), and the rest on 1st January 2020.

FIDLEG and FINIG will lead to an extensive reorganization of Swiss financial market law. FIDLEG will now regulate all financial services, regardless of who provides them (level playing field). These include in particular asset management and investment advice, but not account and custody account management and only very limited lending services. FINIG will regulate all financial service providers, with the exception of banks and insurance companies, which remain regulated under the Banking Act (BA) and the Insurance Supervision Act (ISA).

At the same time as FIDLEG and FINIG, Parliament has included provisions for innovation promotion, better known as the "Fintech licence" or "Banklizenz-light", in the Banking Act (BA), and extended the Consumer Credit Act (CCA) to so-called "crowdlending". The consultation process for the necessary amendments to the Banking Ordinance and the Ordinance on the Consumer Credit Act has been in progress since 21st June 2018. The amendments to the BA, the CCA and the associated ordinances are to come into force together on 1st January 2019.

In six separate publications we will explain the effects of FIDLEG and FINIG on the following areas:

1. The Fintech legislation
2. The new prospectus law
3. The independent asset managers
4. The investment advisors
5. Collective investment schemes
6. The law of civil procedure

Background information

As part of the Fntech proposal announced in November 2016, the Federal Council already enacted an amendment to the Banking Ordinance on 1st August 2017, creating a "sandbox" in which a total value of up to CHF 1 million, unlimited (instead of the previous 20) public deposits can be received, and extending the deadline for holding funds on settlement accounts from seven to 60 days.

Two aspects of Fintech legislation

Deregulation: Fintech license

The "Fintech licence" created by the new Art. 1b BA is intended to enable licensees to accept public deposits of up to CHF 100 million on a professional basis without requiring a banking licence. However, the deposits received are subject to an investment and interest rate prohibition. Approval is also subject to conditions regarding organization, risk management, compliance, accounting, financial reporting resources, which are regulated in the Banking Ordinance and are currently still being reviewed.

Two crucial factors determine the application possibilities and thus the practical relevance of the "Fintech licence": the interpretation of the investment and interest rohibition and the possibility for the new licence holders to open accounts with the Swiss National Bank (SNB).

The investment and interest prohibition states that deposits received (up to CHF 100 million) may not be invested or accrue interest until the time of transfer or repayment. The significance of this provision was controversial. In its Circular 2008/3: "Public deposits with non-banks", FINMA interpreted it very restrictively and demanded that deposits paid in by clients remain constant and liquid until they are passed on or repaid. Deposits may not be held in the company's normal business accounts for day-to-day operations, instead at least one separate bank account must be opened for holding deposits (cf. paragraph 8.2 FINMA Circ. 08/3). This restrictive interpretation has been adopted in the explanatory report for the revised Banking Ordinance. It is stated there that the funds received must remain liquid until they are passed on or repaid as intended, so that they may be withdrawn within the shortest possible time. As an example, custody of sight deposits in a bank account separate from own holdings and without restrictive deduction restrictions is cited (cf. p. 16 et seq. of the explanatory report).

This restrictive interpretation severely limits the application possibilities for the new "Fintech license". The only possible options are business models in the areas of brokerage (e.g. crowdlending) or payment service providers (e.g. pre-paid issuers, top-up wallets).

The second sticking point concerns the opening of an account with the SNB. There is a risk that the SNB will also commit to a restrictive interpretation and exclude Fintech licence holders. The application possibilities of the newly created Fintech license would in fact be greatly reduced once again.

Regulation: crowdlending under CCA

Irrespective of wide circles in the industry, the Cosumer Credit Act was adapted together with the "Fintech licence" – in the sense of an "accompanying measure". Consumer loans brokered by a so-called "Schwarmkredit-Vermittler" (crowdlending company) will now also fall within the scope of the CCA. As a result, the rules of the CCA will have to be observed in future when granting consumer loans via crowdlending platforms, as with "classic" loans. In particular:

- The form and content of consumer credit agreements are determined in accordance with Art. 9/10 CCA;
- The contracts must be concluded in writing (!);
- The maximum interest rate is 10%;
- Consumer credit agreements can be revoked within 14 days and repaid prematurely at any time;
- Before concluding a consumer credit agreement, a detailed credit check must be carried out in which, among other factors, at least the actual rent owed, the taxes owed according to the

withholding tax table and the obligations reported to the Consumer Credit Information Office (IKO) must be taken into account;
- Consumer credits and certain outstanding debts must be reported to the IKO.

Many of the obligations under the CCA are imposed directly on the "Schwarmkredit-Vermittler", i.e. the "crowdlending company". The sanctions will affect them disproportionally: they can be punished with fines of up to CHF 100,000 for violations of the CCA. Lenders (crowd) "only" lose interest and costs.

For crowdlending companies this means that they will now be allowed to broker loans from more than 20 creditors to one consumer. However, in future all consumer loans from the crowd (including loans from less than 20 creditors) must comply with the new requirements of the CCA or the corresponding requirements.

Conclusion: A small step towards deregulation and a big step backwards

The newly created "Fintech license" removes hurdles for certain Fintech business models. In view of the restrictive interpretation, however, the application possibilities are likely to remain within very narrow limits and consist primarily of (credit) brokerage models or (prepaid) payment services.

In contrast, the simultaneous revision of the CCA leads to a significant increase in regulation for precisely those companies for which the regulatory hurdles under the Fintech proposal should actually have been lowered. Crowdlending companies must ensure compliance with the rules of the CCA for granting loans to consumers, as it were on behalf of the non-commercial lenders from the crowd. Even if certain CCA rules (such as credit check or the reporting of loans to the IKO) can also make sense in the context of crowdlending, the opportunity to adapt the law to new technologies and digital business models was omitted from the total revision. For example, the requirement of written form (in view of the 14-day right of withdrawal without disadvantage for consumers) could have been replaced by the phrase: "in text form" and modern forms of credit assessment could have been permitted, which would have allowed for innovation in this area.

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