

The FinTech licence comes into force on 1 January 2019

Within just two years, Swiss lawmakers have implemented three measures to lower the barriers to market entry for FinTech companies, promote innovation in the financial centre and thus strengthen its competitiveness. On 1 January 2019, the provisions for the last of three measures, the FinTech licence, will come into force.

FinTech promotion in Switzerland

All efforts to promote FinTech are based on the generally recognised premise that digitisation and innovation in the financial sector can make a significant contribution to the quality of the Swiss financial centre and strengthen its competitiveness. At its meeting on 2 November 2016, the Federal Council was also guided by this premise and advocated easing the regulatory framework for providers of innovative financial technologies. On the one hand, the simplifications are intended to reduce barriers to market entry for suppliers in the FinTech sector, on the other hand they are also intended to increase legal certainty for the entire industry. Specifically, the Federal Council proposed three measures in the area of financial market regulation, which were, or will be implemented in various stages (1 August 2017, 1 January 2019 and 1 April 2019).

Three measures

To promote FinTech, Switzerland is implementing the following three measures: an **extension of the holding period** for funds on settlement accounts from seven to 60 days, and two new ways of accepting more than 20 public deposits without requiring a banking licence, namely a **"sandbox"** for public deposits of up to CHF 1 million and a **"FinTech licence"** for public deposits of up to CHF 100 million. In both cases, however, the deposits must be held in safe custody in the interest of the customer, the customer must be informed and the interest margin business reserved for the authorised banks may not be carried out.

While the extension of the holding period for funds on settlement accounts hardly requires further explanation, the condi-

tions and peculiarities of the sandbox and the FinTech licence are briefly described below.

Receipt of deposits from the public without interest margin business

The central and common element of the Sandbox and the FinTech licence is the possibility of accepting more than 20 public deposits without requiring a banking licence. In principle, **the professional acceptance of deposits from the public is reserved for banks.**

"Deposits from the public" are generally defined as all amounts due to customers. The only exceptions are listed in Art. 5 para. 3 of the Banking Ordinance and were specified and explained by FINMA in its Circular 2008/3. In principle, the receipt of public contributions continues to require a licence if it is made on a commercial basis.

Exceptions are only granted as long as the core activity of the banks, the **"interest margin business"**, is not carried out. This is not regulated by law, but according to the explanations on the FinTech licence, this means that deposits are accepted as part of the deposit-taking business and thus loans are granted to an indefinite number of persons and companies on their own account as part of the lending business. Loans are granted on a longer-term basis (longer-term capital and interest rate fixation), while customers can usually reclaim their deposits without notice (short-term capital and interest rate fixation). If the average maturity of the assets differs from the average maturity of the liabilities, there is also a maturity transformation. This increases the interest rate and liquidity risks which a bank assumes and for which it is compensated by the interest margin. The risks are also the reason why the licence for banks has strict requirements and without a banking licence, both within the framework of the sandbox and from holders of the new FinTech licence, the interest margin business may not be carried out in the future either.

Sandbox

The **sandbox** is an exception to the criterion of "commercialness" in the acceptance of public contributions. According to the new Art. 6 of the Banking Ordinance, those who do not act on a commercial basis (and therefore do not require a licence) are defined as those who:

- accept deposits from the public totalling a maximum of CHF 1 million;
- do not engage in interest margin business (not until 1 April 2019!); and
- inform depositors that it is not supervised by FINMA and that the deposit is not covered by deposit protection.

Until March 31, 2019, the regulation that came into force on August 1, 2017 still applies to the sandbox, namely that either the ban on investments and interest must be observed or the deposits must be used for "commercial-industrial activities". The new regulation explicitly prohibits the operation of the interest margin business and at the same time enables funds received using the sandbox to be used for private purposes (i.e. not for commercial or industrial purposes). This is justified by the fact that, with the new amendments to the Consumer Credit Act, the so-called "Schwammkredit-Vermittlung", i.e. crowdfunding, also falls under the Consumer Credit Act. The adjustments will take effect on 1 April 2019.

Further requirements for the sandbox are not laid down in the Banking Act or the Banking Ordinance. Not to be forgotten, however, are the other financial market laws, in particular data protection and money laundering legislation, which also remain fully applicable and must be observed in the area of a sandbox.

FinTech Approval

The **FinTech licence**, on the other hand, is a new licence category and is defined in advance in the new Art. 1b of the Banking Act under the title Innovation Promotion. It is intended for persons who:

- professionally accept or publicly rec-

ommend public deposits of up to CHF 100 million; and

- neither invest nor pay interest on these public deposits.

"Persons pursuant to Art. 1b Banking Act", as the holders of the FinTech licence are called in the Act, may therefore also accept deposits from the public without a banking licence. This may not exceed CHF 100 million and only if they refrain from investing and paying interest on the deposits or, in other words, engage in the interest differential business, which remains reserved for the banks.

The FinTech licence is subject to various other conditions. "Persons pursuant to Art. 1b Banking Act" are subject to supervision by FINMA and must fulfil certain requirements with regard to their organisation, risk management, compliance and financial resources and have their activities audited by an approved auditing company. They must also comply with the provisions of the Banking Act, which applies "mutatis mutandis" to them. The Banking Ordinance clarifies in the individual provisions on rights and obligations whether they apply to persons pursuant to Article 1b of the Banking Act. Special mention should be made to:

- Obligations to provide information in particular on the risks associated with the business model, the services offered and the technologies used and on the fact that there is no deposit

guarantee for public deposits. This information may not only be contained in the general terms and conditions.

- Only a stock corporation, a limited partnership or a limited liability company (GmbH) can be considered a form of company, the registered office must be in Switzerland and the administration must be carried out in Switzerland.
- Conditions for management, executive bodies, compliance and risk management.
- The deposits received from the public must be kept separately from own funds or recorded in the accounts in such a way that they can be shown separately from own funds at any time. In the latter case, an ordinary audit is prescribed.
- The minimum capital is 3 % of the subscribed capital, but not less than CHF 300 000.

Level Playing Field

In the comments on the new FinTech licence, the Federal Council states that **all other laws apply in full** to "persons under Art. 1b of the Banking Act", i.e. the holders of a FinTech licence, insofar as these are applicable due to their activities. This refers in particular to the provisions on data protection or money laundering legislation, which must also be complied with at

all times by holders of a FinTech licence - as well as within a sandbox.

Finally, the Federal Council makes it explicitly clear in the explanations that there are no obstacles whatsoever for established financial service providers to set up, buy or participate in companies with a FinTech licence, thereby maintaining the **level playing field** in the financial market.

Info evening on the FinTech and bank licence

Kellerhals Carrard and Soranus AG are organising a free information evening on the FinTech and banking licences, followed by an aperitif:

Tuesday, 22 January 2019, from 16.30, at the FIFA Museum Zurich

Please register at: <https://fintech-training.ch/events/bankbewilligung-und-fintech-lizenz/> (powered by fintechrockers.com).

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