Legal and regulatory framework in the context of open banking in Switzerland

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I. Introduction

Open banking enables third-party providers (TPP), e.g. FinTech companies offering services such as payment initiation or account information to use the banks' customer data, under the prerequisite of the consumers' consent.[1] For this purpose, the bank provides an application-programming interface (API). APIs open "channels" to TPP, which allow quick and easy data exchanges in a standardized way.[2]

For instance, modern payment services such as Apple Pay, Twint or Android Pay regularly rely (at least partially) on the existing payment infrastructures in the

1 Cf. <https://www.moneytoday.ch/lexikon/open-banking/>; BK OR-WEBER, Art. 84 N 157.

2 ESSEBIER /BOURGEOIS, EuZ 2018, p. 117.

background and process according to the rules and procedures of payment card schemes.[3] The employed technic, device or channel may vary hereby.[4]

Payment initiation services in particular (e.g. Sofort Banking or giropay) enable a customer to initiate payment directly on the Internet when completing a deal online. In the business models of some service providers, the online retailer forwards the customer to the website of the payment initiation service. The latter in turn accesses the customer's payment account at the payment service provider (the bank) holding the customer's account. The bank then generates a transaction authentication number (TAN), which it communicates directly to the user, who enters it into the platform to confirm payment. The TAN is again passed on to the bank, which proceeds to execute the payment.[5] After checking the account information, e.g. turnover, the payment initiation service informs the online merchant about the payment release and the retailer sends the goods immediately.[6]

In order to offer modern payment options via e banking and smartphones, additional players other than banks are indispensable. Depending on the specific design of the provided payment system, Internet access is necessary, which requires an Internet Service Provider (ISP) and a Telecommunications Service Provider (TSP). The involvement of the latter and TPP – e.g. of payment initiation services – create complex infrastructures.[7]

Even though there is **no specific, comprehensive regulation of payment service providers** in Switzerland, TPP operate in a highly regulated space. Thus, business models in the area of payment services may be obliged to meet requirements deriving from numerous legal areas.[8] In the following, the legal and regulatory aspects will primarily be presented for payment services and where pertinent, for further business areas such as securities transactions, granting of credits or verification of client data.

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3 For a detailed and illustrative overview on payment schemes, see STENGEL /WEBER, Digitale und mobile Zahlungssysteme, passim.

4 Federal Department of Finance, Explanatory Report on the Amendment of the BA and BO, 1 February 2017, p. 8 et seq.; FLÜHMANN /HSU/ENDER, GesKR 2017, p. 18 et seq.

5 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 22.

6 Federal Department of Finance, Explanatory Report on the Amendment of the BA and BO, 1 February 2017, p. 8 et seq.

7 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 186 et seq.

8 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 184; Cf. also Financial Action Task Force, Guidance for a Risk-Based Approach – Prepaid Cards, Mobile Payments and Internet Based Payment Services, June 2013, art. 53; Information Systems Audit and Control Association, Mobile Payments: Risk, Security and Assurance Issues, in: Emerging Technology White Paper, November 2011, p. 12.

II. Legal and regulatory framework

1. Banking

Banks and banks only are authorised to accept deposits from the public on a commercial basis (art. 1 para. 2 Banking Act [BA][9]). A bank may operate in the market if it has a license as a bank obtained prior to commencing its business activities.[10] According to art. 6 para. 1 Banking Ordinance (BO)[11], deposit-taking is considered a commercial activity when a person either accepts, on a recurring basis, more than 20 individual deposits from the public, or advertises for such deposits in any form whatsoever, e.g. by means of advertisements, prospectuses, circulars or the use of electronic media.[12]

The rendering of payment services generally requires TPP to temporarily hold third party funds. For example, a payment system may be based around customers maintaining an electronically registered account balance for later use in payment transactions. Such a system requires the TPP to hold the funds received from the customers for their benefit. Even if a payment system does not allow customers to maintain account balances, the execution of payment transactions usually involves money passing through the TPP client money accounts before it is passed on to the end recipient. In these or similar circumstances, a TPP can be deemed as accepting deposits from the public within the meaning of the BA.[13]

Thus, crucial for the question of a licensing requirement is whether the business activities of payment services can be qualified as exceptions to the concept of receiving deposits from the public according to art. 5 para. 3 BO.[14]

The Swiss Financial Market Supervisory Authority (FINMA) has set out its practice with regard to the qualification of deposit-taking activities in the FINMA-Circular 2008/3 "Deposits from the Public with Non-Banks". It excludes payment instruments and payment systems for the purchase of goods or services from the scope of application of the BA if the **maximum credit balance per client** is no more than

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9 Banking Act (BA; SR 952.0).

10 Art. 3 BA; Cf. also Harald Bärtschi's and Christian Meisser's contribution on the question of the authorisation requirement under the BA: BÄRTSCHI/MEISSER, Virtuelle Währungen, p. 126 et seqq.

11 Banking Ordinance (BO; SR 952.02)

12 WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 22.

13 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 8.

14 WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 22.

CHF 3,000 and no interest is paid for it (no. 18bis FINMA-Circular 2008/3 in connection with art. 5 para. 3 lit. e BO).[15]

Likewise, according to the BO, deposits from the public are not funds received on so-called **settlement accounts** (Abwicklungskonto)[16], and for which no interest is paid. The maximum holding period to process the customers' payment transactions is 60 days (art. 5 para. 3 lit. c BO). Even in the case of pure money and value transfers, as with money transmitters, funds are considered public deposits and the settlement account exception applies.[17]

Furthermore, there is a license-free innovation area (so called **sandbox**[18]; art. 6 para. 2-4 BO), which permits public deposits of up to CHF 1 million as long as certain information obligations towards customers are met. As long as an operator stays below this threshold, it is not considered to be active on a commercial basis, irrespective of the actual number of deposits and irrespective of whether deposits are publicly solicited.[19]

Last but not least, an authorisation category with simplified requirements (so called **FinTech license**) under art. 1b of the BA allows FinTech companies to accept deposits from the public of up to CHF 100 million on a commercial basis.[20] The license allows the acceptance of deposits from the public up to a maximum of CHF 100 million with the limitations that no interest are paid on such deposits and the operators are not allowed to invest the funds received from the depositors (cf. art. 1b para. 1 BA).

Regarding **payment initiation services** in particular, where payment is made directly from the user's bank to the merchant's bank – TPP are generally **not involved in the flow of funds**. Hence, no payments pass through its accounts. Conclusively, the

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15 WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 22 et seq.

16 Settlement accounts serve to create liquidity for the settlement of a main transaction.

17 LEIMGRUBER/FLÜCKIGER, Jusletter 6. November 2017, marginal 19; Federal Department of Finance, Amendments to the Banking Ordinance (Fintech), Explanatory Notes of 5 July 2017, p. 9.

18 Creation of a largely unregulated innovation space. In the Asia-Pacific region, Singapore, Hong Kong, Malaysia and Australia have established sandboxes (newsletter article dated 26 January 2017: <http://www.finews.asia/finance/23809-fintech-innovation-bank-of-england-markcarney-ravi-menon>). A sandbox has also been established in Great Britain and is being considered in the United States of America (cf. Federal Department of Finance, Explanatory Report on the Amendment of the BA and BO, 1 February 2017, p. 28 and 30.).

19 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 15.

20 For further information on the so called Fintech license, see here: <https://www.finma.ch/en/authorisation/fintech/fintech-bewilligung/>

activity of those TPP is **out of the scope of banking regulation**.[21] Other TPP involved in any flow of funds of client money, however, have to make sure **to structure themselves** in a way that they **meet the** outlined **exceptions** above in order **to avoid** a qualification as deposit-taking from the public and thus, **requiring a banking license**.[22]

2. Compliance

Banks as providers of payment services are subject to the strict requirements of the BA. Starting point is the banking secrecy according to art. 47 BA.[23] The requirements for the compliance function and risk control are set out in para. 100-126 FINMA-Circular 2008/24 "Monitoring and Internal Control at Banks".[24]

For compliance management, the requirements stipulated by FINMA-Circular 2008/21 "Operational Risks Banks" are of central importance. The term "operational risks" covers a broad spectrum of events ranging from legal and fraud cases to IT breakdowns. In its appendix 3, FINMA eludes the requirements for proper risk management in connection with the confidentiality of electronic personal data in nine Principles.[25]

The ninth principle in particular includes recommendations regarding outsourcing services and large orders in connection with client identifying data (CID).[26] The bank has a due diligence obligation with regard to the selection of an outsourced service provider. It must ensure that it has comprehensive knowledge of the key controls that the outsourced service provider must carry out in connection with the confidentiality of CID and of the specific content of its task.[27]

Outsourcing abroad is permitted according to the FINMA-Circular 2018/3 "Outsourcing banks and insurances", if the company can give an explicit guarantee

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21 Cf. FLÜHMANN /HSU/ENDER, GesKR 2017, p. 23.

22 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 19.

23 Cf. HESS, Kundendatendiebstahl, p. 69 et seqq.

24 For a discussion of FINMA-Circular 2008/24, see: STRASSER, Interne Untersuchungen, p. 248 et seqq. Cf. also «Guidelines on data protection in EU financial services regulation» of the European Data Protection Supervisor, available under: <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Thematic%20Guidelines/14-11-25_Financial_Guidelines_EN.pdf>.

25 Cf. KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 189.

26 Cf. Principle 2 of Appendix 3, FINMA Circular 2008/21, Operational Risks Banks, 20. November 2008, para. 9.

27 Cf. KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 193.

that it, its auditing company and FINMA can exercise and enforce their inspection and auditing rights. The outsourcing agreement must be in writing.[28]

Conclusively, banks are subject to a wide set of compliance rules whereas **TPP have no specific set of compliance rules to comply with**. This however must be taken into account when drafting contracts in the bank-TPP relationship.

3. Financial market infrastructure

Financial market infrastructures, i.e. stock exchanges, multilateral trading facilities (MTF)[29], central counterparties, central securities depositories, payment systems and trade repositories (cf. art. 2 lit. a of the Financial Market Infrastructure Act (FMIA)[30] are essential for the smooth functioning of financial markets. They **generally require a licence**[31] from the **FINMA**, however, for **payment systems**, the **special provisions** under art. 4 para. 2 FMIA apply.[32]

Accordingly, payment systems only require a licence 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 (cf. art. 4 para. 2 FMIA).[33] The necessity for a license arises in particular if a payment system intends to process and clear payment transactions among financial intermediaries, i.e. as opposed to payments among individuals and businesses, and the Swiss National Bank (SNB) determines that the payment system is systemically relevant.[34] So far, only the Swiss Interbank Clearing system (SIC) is designated by the SNB as a systemically relevant payment system.[35] According to the Swiss Federal Council's message regarding the

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28 FINMA-Circular 2018/3, Outsourcing Banks and insurances, 21. September 2017, para. 30 and 32.

29 Multilateral trading systems differ from stock exchanges in that they trade securities but are not listed. See: Swiss Federal Council's message on the FMIA dated 3 September 2014, BBl 2014 7483, p. 7485.

30 Financial Market Infrastructure Act (FMIA; SR 958.1).

31 The decision on the license comes in the form of a decree, which may be appealed to the Federal Administrative Court (Bundesverwaltungsgericht) by the persons concerned and to the Federal Supreme Court in the second instance (cf. Art. 54 Financial Market Supervision Act, [FINMASA; SR 956.1]).

32 JUNGO/ZIBUNG, FINMA, § 20 N 2 and 4.

33 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 7.

34 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 7.

35 Cf. information available under: <http://www.snb.ch/en/iabout/finstab/finover/id/finstab_systems#t2>.

FMIA, payment systems are not generally covered by the protective purpose of the FMIA.[36] To date, however, a practice has yet to be established in this regard.[37]

Conclusively, **TPP of payment systems** are generally **not required to obtain a license** under the FMIA. However, TPP of **other financial market infrastructures** - i.e. stock exchanges or central counterparties (CCP)[38] - require a **licence from FINMA** prior to the commencement of its activities (cf. art. 4 para. 4 FMIA in connection with art. 4 para. 1 Financial Market Infrastructure Ordinance [FMIO][39]).[40]

The licensing **requirements vary** depending on the financial market infrastructure. The general (cf. art. 8-21 FMIA) and the specific requirements (cf. art. 5 FMIA) must be met.[41] Financial market infrastructures domiciled abroad do not require a licence, but may have to obtain a FINMA recognition (cf. art. 41, 60 and 80 FMIA).[42]

In addition to the supervisory requirements for financial market infrastructures in art. 83 et seqq. FMIA, the FMIA further stipulates rules that apply to all financial market participants in connection with the trading of securities and derivatives (so-called market conduct rules). These are provisions on trading in derivatives, on the disclosure of shareholdings, on public purchase offers and on insider trading as well as market manipulation (cf. art. 8 et seqq. FMIA).[43]

Financial market infrastructures that **outsource essential services to TPP** need to get a **FINMA approval** in advance (cf. Art. 11 FMIA). Art. 12 of the Financial Market Infrastructure Ordinance (FMIO)[44] defines as essential services those services characteristic of a financial market infrastructure that are directly related to its business activity, namely liquidity management, treasury, risk management, master data administration and accounting, human resources, information technology, legal affairs and compliance.[45]

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36 Swiss Federal Council's message on the FMIA dated 3 September 2014, BBl 2014 7483, p. 7517.

37 JUNGO/ZIBUNG, FINMA, § 20 N 9.

38 Art. 48 FMIA: "A central counterparty is an entity based on uniform rules and procedures that interposes itself between the counterparties to a securities transaction or other contract involving financial instruments, thereby becoming the buyer to every seller and the seller to every buyer."

39 Financial Market Infrastructure Ordinance (FMIO; SR 958.11).

40 JUNGO/ZIBUNG, FINMA, § 20 N 12.

41 JUNGO/ZIBUNG, FINMA, § 20 N 15.

42 JUNGO/ZIBUNG, FINMA, § 20 N 4.

43 Swiss Federal Council's message on the FMIA dated 3 September 2014, BBl 2014 7483, p. 7498.

44 Financial Market Infrastructure Ordinance (FMIO ; SR 958.11).

45 SK FinFraG-JUNGO/ZIBUNG/ROTH, Art. 11 N 8.

4. Financial Institutions and Services

The Financial Institutions Act (FIA)[46] and the Financial Services Act (FSA)[47] are expected to enter into force on 1. January 2020.[48] On the one hand, the FIA regulates the supervision of financial institutions, i.e. asset managers, trustees, collective asset managers, fund management companies and securities firms (cf. art. 2 lit. a – e FIA). On the other, the FSA lays down requirements for the provision of financial services (cf. art. 1 para. 2 FSA).

TPP engaged in securities transactions, e.g. online brokering systems, might require a licence from FINMA. This is namely required for anyone who, commercially (cf. art. 3 FIA), buys and sells securities on the financial market for his own account for short-term resale or for the account of third parties, or offers them to the public (cf. art. 5 FIA in connection with art. 41 FIA). Conclusively, **TPP offering securities transactions** on a commercial basis **may qualify as a financial institution** (cf. e.g. art. 17 and art. 41 FIA) and therefore **require** a **FINMA licence** (cf. art. 5 FIA).[49]

The legal basis for securities transactions is usually a brokerage agreement (cf. art. 425 Code of Obligation [CO][50]) in which the TPP, as a purchase or sales agent, undertakes the purchase or sale of securities in his own name for the account of the principal in return for a commission fee.[51] However, engaging in securities transactions may entail considerable risks, thus TPP need to inform their customer about the transaction processing. The **obligations** arise on the one hand from the application of the agency contract (cf. art. 398 CO), on the other from further specified duties of conduct from the FSA (cf. art. 8 et seqq. FSA).[52]

TPP must namely conduct an **adequacy and suitability test** on the customer interested in the financial service (cf. art. 10 et seqq. FSA). Furthermore, TPP making a public offer to purchase securities in Switzerland or applying for admission to trading in such securities on a trading venue is - unless expressly exempted - required to **publish a prospectus** (cf. art. 35 et seqq. FSA). The Federal Department of Finance namely

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46 BBL 2018 3557, expected entry into force is 1. January 2020.

47 BBL 2018 3615, expected entry into force is 1. January 2020.

48 See Federal Department of Finance' press release from October 2019: <https://www.efd.admin.ch/efd/de/home/themen/wirtschaft--waehrung--finanzplatz/finanzmarktpolitik/fidleg-finig/fb-fidleg-finig.html>. Until the end of 2019, the Stock Exchange Act (SEA; SR 954.1) remains pertinent for securities transactions in particular.

49 Cf. WEBER, E-Commerce und Recht, p. 631.

50 Code of Obligations (CO; SR 220).

51 WEBER, E-Commerce und Recht, p. 627.

52 Cf. WEBER, E-Commerce und Recht, p. 627.

specified that the supply of information on online platforms may already constitute a public offer if the listed securities are acquirable directly via an online platform.[53]

Additionally, whenever more complex financial instruments are offered to private customers, there is an obligation to prepare a **basic information sheet**.[54] Lastly, customer advisors (natural persons) working for an unlicensed financial services provider (c.f. art. 5 FIA) need to register with a **customer advisor register**, if they serve customers in Switzerland, regardless of their business domicile (cf. art. 28 FSA).[55] Conclusively, **TPP** offering **securities transactions** may be obliged to **meet** numerous **duties of conduct** as set out in the FSA.

5. Anti-money laundering

The Anti-Money Laundering Act (AMLA)[56] applies to all so-called financial intermediaries. This term covers all natural and legal persons who commercially accept, hold or assist in the investment or transfer of third-party assets (cf. art. 2 para. 3 AMLA).

The operation of a payment system **qualifies as financial intermediation**.[57] The obligations of financial intermediaries that are not otherwise regulated are governed by art. 3-8 AMLA (due diligence) and art. 9-11 AMLA (obligations in the event of suspicion of money laundering).[58] Financial intermediaries are further required to either **join a recognized self-regulatory organization (SRO)** for anti-money laundering purposes, **or**, in the alternative, **obtain a license from FINMA** as a so-called directly supervised financial intermediary (DSFI; art. 14 para. 1 AMLA). Payment service providers qualifying as a financial intermediary may benefit from some exemptions and simplified processes that may provide relief in specific cases.[59] The AMLA's due diligence obligations may be waived, for example, if certain threshold values in the area of cashless payment transactions are not exceeded (art. 11 Anti-Money Laundering Ordinance-FINMA [AMLCA-FINMA][60]). These thresholds

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53 Cf. Explanatory report on the opening of the consultation procedure Financial Services Ordinance, Financial Institutions Ordinance and Supervisory Organisation Ordinance of 24 October 2018, p. 20; SPILLMANN/GIGER, GesKR 2019, p. 189.

54 Swiss Federal Council's message on the FSA/FIA dated 4. November 2015, BBl 15.073 8901, p. 8903.

55 NOBEL, Finanzmarktrecht, § 10 N 247.

56 Anti-Money Laundering Act, (AMLA; SR 955.0).

57 Cf. art. 2 para. 3 lit. b AMLA: Financial intermediaries are persons who "provide services related to payment transactions […]."

58 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 194.

59 In detail, see: FLÜHMANN/HSU/ENDER, GesKR 2017, p. 12 et seqq.

60 Anti-Money Laundering Ordinance-FINMA (AMLCA-FINMA; SR 955.033.0).

are also regularly exhausted by TPP of payment service providers in order to benefit from the exemption provisions.[61]

The AMLA is a framework law, i.e. it lays down general provisions, which are further specified by accompanying FINMA ordinances and the regulations of SRO.[62] FINMA has detailed its relevant regulatory practice in the FINMA-Circular 2011/1 – "Activity as a Financial Intermediary under the AMLA". The key aspect according to the circular with regards to financial intermediaries transmitting liquid financial assets is the power of the financial intermediary, granted to it by its contracting party, to **dispose over financial assets** of the latter (Verfügungsmacht über fremde Vermögenswerte).[63] Within this context, the transfer or forwarding of assets on behalf of the debtor of the relevant obligation (i.e. the payor) is considered financial intermediation.[64]

Further remarkable is FINMA-Circular 2016/7 "Video and online identification", which equals the validity of video to in-person identification and thus, facilitates compliance with the due diligence requirements of AMLA.[65]

Regarding **payment initiation services** in particular, it may be debateable, whether TPP are given power to dispose over third party assets because the banking information is relayed through its platform. As long as the bank is seen as triggering the ultimate payment transaction by generating the TAN (see I. Introduction above), which is communicated separately and directly from the bank to the user, the payment service provider could be seen as being at no point in a position to execute payments of its own accord. Conclusively, the activity of the payment service provider may be regarded as out of scope of AMLA regulation.[66] However, payment systems involving linked bank accounts may already be deemed as being able to dispose over the third party assets and therefore possibly qualify as financial intermediary subject to the AMLA; a **case-by-case analysis is deemed unavoidable**.[67]

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61 Cf. for example the limits on the website: https://www.beboon.com/de/pricing. SCHÄR, FinTech, § 18 N 17.

62 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 195; Cf. e.g. Anti-Money Laundering Ordinance-FINMA (MLO-FINMA; SR 955.033.0).

63 FINMA-Circular 2011/1, "Activity as a Financial Intermediary under the AMLA", 20. October 2010, para. 58.

64 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 11.

65 WEBER, SZW 2016, p. 566.

66 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 23.

67 Cf. FLÜHMANN /HSU/ENDER, GesKR 2017, p. 20.

6. Data protection

Data security is of great importance for transactions via digital payment systems, as those systems can only prevail if its users have confidence in its integrity and authenticity. The use of payment systems involves the transmission and processing of personal data. Thus, the provisions of the data protection law (Data Protection Act [DPA][68] and ordinance [DPO][69]) and the associated recommendations of the Federal Data Protection and Information Commissioner (FDPIC) are equally **relevant for all players involved**.[70] Furthermore, the EU General Data Protection Regulation (GDPR) may also be pertinent, especially due to its extraterritorial scope of application.[71]

Processing payment services poses the risk of passing on personal data to third parties who may misuse it (e.g. as a basis for spam mails). Transaction data generated during the execution of mobile payment services can regularly be allocated directly to a person, i.e. the person can be "identified" within the meaning of the DPA. Under certain circumstances, it may even be possible to create personality profiles (cf. art. 3 lit. d DPA). TPP are therefore responsible for ensuring that the solutions they offer only enable data processing that complies with pertinent data protection regulations.[72] Personal data may not be collected if not directly required for transaction processing (cf. art. 4 para. 3 DPA).[73] Wherever possible, the user of a mobile payment service solution needs reasonable options, which allow him or her to decide which data may or may not be transmitted to a third party.[74]

Conclusively, **TPP** as well as the other players involved in payment transactions or other business areas **must abide to the data protection provisions**.

7. Telecommunications

For many TPP business areas, the use of the Internet or the telecommunications network is mostly inevitable. In Switzerland, the Telecommunications Act (TCA)[75] applies to Internet and telecommunications service providers. The provision of so-called universal services is subject to a concession (cf. art. 16 TCA). However, **payment**

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68 Data Protection Act (DPA; SR 235.1).

69 Data Protection Ordinance (DPO; SR 235.11).

70 STENGEL/WEBER, Digitale und mobile Zahlungssysteme, marginal 693.

71 PFAFFINGER, DSGVO, passim.

72 WEBER, Revue Lamy Droit des Affaires 2012, p. 105, based on an explanation on mobile payment by the Federal Data Protection and Information Commissioner (FDPIC) that has since been removed from the Internet.

73 BSK DSG-GRAMIGNA/MAURER-LAMBROU, art. 8 N 28.

74 WEBER, Revue Lamy Droit des Affaires 2012, p. 105; WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 28.

75 Telecommunications Act (TCA; SR 784.10).

services in particular do not fall within the scope of the universal service, which is why such providers **do not have to undergo a licensing procedure under the TCA**. However, concerning payment services there may be an obligation to notify the Federal Office of Communications (OFCOM) for statistical purposes in particular.[76]

One of the aims of the TCA is to respect personal and incorporeal property rights (cf. art. 1 para. 2 lit. b TCA). Providers of a service are subject to the secrecy of telecommunications (art. 43 TCA) and to a notification obligation pursuant to art. 4 TCA as well as to the supervision of the Federal Office of Communications (OFCOM) pursuant to art. 58 et seq. TCA. The TCA further imposes certain obligations with regard to data processing.[77]

Conclusively, Internet and telecommunications service providers need to adhere to the TCA, however, **TPP offering payment services are not subject to its regulations**.

8. Contracts

Cashless payment transactions are transfers of book money by debiting and crediting accounts.[78] Under Swiss law, such transfers in principle do not constitute payments in the legal sense, with the exception of sight deposits with the Swiss National Bank, which are legal tender in addition to banknotes and coins (art. 2 of the Currency and Payment Instruments Act [CPIA][79]).[80] Cashless transfer is only possible if the creditor agrees to it (explicitly or implicitly).[81]

The use of payment systems is normally based on a contractual relationship between the TPP and the user. The authorized representative or the provider of the payment system is obliged to conduct business in accordance with art. 398 CO, and is thus subject to the due diligence and loyalty obligation of the simple agency contract.[82] The authorized representative is required to do everything in his power to ensure that the main service is executed correctly and that the success of the contract is achieved. The

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76 WEBER, Revue Lamy Droit des Affaires 2012, p. 105, based on an explanation on mobile payment by the Federal Data Protection and Information Commissioner (FDPIC) that has since been removed from the Internet; WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 26.

77 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 197.

78 HESS/KEISER, SZW 2009, p. 158, with references to: Swiss Federal Council's Message on the NBA dated 26. June 2002, BBl 2002 6097, p. 6185; GIOVANOLI MARIO, Bargeld, Buchgeld, Zentralbankgeld, p. 87 et seqq.

79 Currency and Payment Instruments Act (CPIA).

80 HESS/KEISER, SZW 2009, p. 158.

81 BK OR-WEBER, art. 84 N 157.

82 Cf. EMMENEGGER, Dritten Zahlungsdienstleistern, p. 104.

creditor's interest in integrity must be taken into account. [83] Inappropriate, careless conduct is therefore generally regarded as a breach of contract.[84]

As part of their due diligence, banks are obliged to protect sensitive data such as CID. In the general terms and conditions (GTC), customers are accordingly obliged not to pass on their authentication features for the use of e banking to TPP. However, this is exactly what happens when using TPP services (apps, digital wallets, etc.). Without the transfer of customer data, the customer would not be able to make use of these TPP services. Many GTC also contain limitations or even exclusions of liability.[85] Such disclaimers primarily expose the customer to the risk of having to bear a large proportion of possible liability risks himself, even if he is not responsible for them.[86] For the drafter of the GTC, on the other hand, it may happen that his GTC do not stand up to judicial review and that he is therefore unable to effectively pass on the liability risks to his customer (art. 8 Act against Unfair Competition [UWG][87]).[88]

In addition to inadequate GTC, there is also the risk of inadequate consents. When the provider of a payment system obtains consent to process the customer's data lawfully, the consent must meet certain requirements. Particular caution is required when giving consent to GTC and general or blank powers of attorney, which do not explain the actual scope of the processing. Such a consent can be ineffective and lead to an illegal data processing by the provider.[89]

Conclusively, in the TPP**-**customer relationship, **TPP are subject to the simple agency contract**, hence, careless conduct may constitute a breach of contract. Moreover, it is recommendable to **document at all times a sufficient customer consent** to the TPP services, preferably in writing. When banks chose to contract with a TPP, it is further indispensable to permit their customers to use the payment services without defaulting their contract with the bank.

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83 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 199.

84 BK OR-FELLMANN, art. 398 N 21.

85 Cf. HESS, Kundendatendiebstahl, p. 70 et seqq.

86 Cf. EMMENEGGER, PSD2, p. 59 et seqq. and p. 62.

87 Act against Unfair Competition (UWG; SR 241).

88 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 199. Regarding the affirmative applicability of the UWG, see WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 33.

89 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 200.

9. Consumer Credit

The Consumer Credit Act (CCA)[90] regulates and limits the granting of credits to consumers. This also includes credit cards and customer cards with credit options (art. 1 para. 2 lit. b CCA) and may in addition be relevant for other post-paid payment instruments and debit instruments with overdraft facilities.[91]

A credit qualifies as a consumer credit within the meaning of the CCA if it is granted to individuals for purposes other than business or commercial activities[92] and either the credit grantor or the credit intermediary[93] act on a commercial basis[94] (art. 1 in conjunction with art. 2 and 3 CCA). In the case of a credit intermediary, the persons granting the credits may also act on a non-commercial basis and the contract still qualifies as a consumer contract (e.g. crowd lending).[95]

Persons who, on a commercial basis, grant consumer credits or engage in intermediation activities relating to consumer credits require a cantonal **authorization** (art. 1 para. 1 in conjunction with art. 39 CCA). The authorisation is valid for the entire territory of Switzerland (art. 39 para. 2 CCA).[96] Additionally, consumer credit agreements are subject to mandatory form and content requirements as well as to a maximum interest rate (currently 10% p.a. and 12% p.a. for credit card debt; cf. art. 4 CCA and art. 1 Consumer Credit Ordinance [CCO][97]).[98] Moreover, commercial credit grantors and/or credit intermediaries need to comply with art. 13 CCA (consent of the legal representative) and art. 16 CCA (consumer's right of withdrawal). Finally yet importantly, they are further obliged to report to the information office for consumer credit (ICO) and conduct a creditworthiness check-up (art. 22 et seqq. CCA).[99] Non-compliance with these provisions may result in the nullity[100] of the credit agreement (cf. art. 15 CCA) or be sanctioned by a fine[101] (art. 32 et seq. CCA).

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90 Consumer Credit Act (CCA; SR 221.214.1).

91 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 13.

92 CHK KKG-BRUNNER, art. 1–42 N 27.

93 In German: «Schwarmkredit-Vermittlerin» (cf. art. 2 lit. b CCA).

94 "The legal concept of commercial activity contains as a characteristic an organized and regular activity, which is designed to last for a certain period and from which an economic result is generated." in: CHK KKG-BRUNNER, art. 1–42 N 22.

95 On crowd lending platforms, the "crowd" grants and finances credits via the Internet: Cf. STENGEL/STÄUBLE, Jusletter from 6. May 2019, marginal 8 and 10.

96 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 13 et seq.

97 Consumer Credit Ordinance (CCO; SR 221.214.11).

98 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 13.

99 STENGEL/STÄUBLE, Jusletter from 6. May 2019, marginal 11 et seq.

100 On the consequences of nullity: KOLLER-TUMLER, Konsumkreditverträge, p. 36 et seqq.

101 On the consequences of sanctions: KOLLER-TUMLER, Konsumkreditverträge, p. 38 et seqq.

Certain types of credits are exempt from the CCA's scope of application. Namely, secured credits (art. 7 para. 1 lit. a and b CCA); credits that are granted without any interest and charges, either outright or subject to repayment in full in a single instalment (art. 7 para. 1 lit. c and d CCA); credits that are granted without any interest and charges, either outright or subject to repayment in full in a single instalment (art. 7 para. 1 lit. c and d CCA); credits that are granted or coordinated in amounts of less than CHF 500.- or more than CHF 80'000.- towards the same consumer (cf. art. 7 para. 1 lit. e CCA) and credits that must be repaid within three months (cf. art. 7 para. 1 lit. f CCA).[102]

TPP of a payment initiation service in particular are **not involved in any consumer credit business**. Consequently, its activities are **out of the scope of the CCA**. However, it may apply in the relationship between the user and its bank to the extent that payments trigger an overdraft.[103] Other TPP involved in granting credits or acting as a credit intermediary may **operate** in a way that they **meet the** outlined **exceptions** above in order **to avoid** a qualification as creditor and thus, **requiring an authorization**. Otherwise, the respective TPP must **conclude** the relevant **contractual arrangements in writing** in accordance with the pertinent provisions of the CCA (note art. 8 para. 2 CCA).[104]

10. Crimes/sanctions

Apart from the provisions of the AMLA, which aim to prevent the illegal introduction of "substitute money" (cf. 2. Anti-Money Laundering above), TPP of payment services are exposed to further criminal risks:[105]

The focus is particularly on so-called "computer offences". Pertinent are the provisions on **unauthorised obtaining of data** according to art. 143 Criminal Code (CC)[106] or **unauthorised access to a data processing system** according to art. 143bis CC. Any damage to data is assessed according to art. 144bis CC.[107] Furthermore, fraud or specifically **computer fraud** according to art. 146 and 147 CC may also be pertinent.

Additionally, intentional or negligent activity as a financial market infrastructure without a licence is punishable by law (art. 44 Financial Market Supervision Act,

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102 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 14.
103 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 23.
104 FLÜHMANN /HSU/ENDER, GesKR 2017, p. 18.
105 WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 35.
106 Criminal Code (CC; SR 311.0).
107 Cf. WEBER ROLF H., Überblick webbasierte und mobile Zahlungssysteme, p. 36.

(FINMASA).[108] Further criminal provisions are also provided in the FSA, FIA, FMIA, AMLA and the BA (cf. art. 89 et seqq. FSA, art. 69 et seqq. FIA, art. 147 et seqq. FMIA, art. 37 et seq. AMLA and art. 46 et seqq. BA).

Lastly, **administrative sanctions** from FINMA, OFCOM and FDPIC are possible, if the TPP is in breach of law. [109]

III. Conclusion

Financial market law, in particular, offers simplifications and exceptions for innovative market participants, but is still strongly regulated. The entry hurdles for TPP remain relatively high. It is therefore advisable to clarify very precisely, which obligations are applicable for the specific case, since a breach of the obligations can lead to criminal liability.

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108 Financial Market Supervision Act, (FINMASA; SR 956.1).

109 KELLER/HESS, Anforderungen webbasierte und mobile Zahlungen, p. 200.

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