LEXOLOGY®
Getting The Deal Through

Cryptoassets & Blockchain

in Switzerland

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GENERAL LEGAL AND REGULATORY FRAMEWORK

Legal framework

What legal framework governs cryptoassets? Is there specific legislation governing cryptoassets and businesses transacting with cryptoassets?

Currently, there is no specific regulation of cryptoassets in Switzerland. However, the Swiss Financial Market Supervisory Authority (FINMA) categorises cryptoassets based on the underlying economic function and applies the already existing financial market regulations to the cryptoasset itself, its issuance and transfers of it. FINMA differentiates between three distinct types of cryptoasset (which it refers to as tokens): asset (or security) tokens, payment tokens and utility tokens.

Depending on the nature of a specific cryptoasset, the following laws must be observed:

- the Banking Act;
- the Financial Market Infrastructure Act (FMIA);
- the Act on Collective Investment Schemes;
- the Act on Insurance Supervision; and
- the Anti-money Laundering Act (AMLA).

As of 1 January 2020, financial services providers must also comply with the Financial Services Act and the Financial Institutions Act.

From a commercial law point of view, two types of token can be distinguished. First, there are tokens that primarily represent a value within the blockchain context (eg, cryptocurrencies such as bitcoin). According to the prevailing view, these so-called 'payment tokens' represent purely factual, intangible assets. The second category of token covers those that represent a legal position (eg, claim, membership) and fulfils a similar function as securities.

On 22 March 2019 the Swiss Federal Council proposed the amendment of several existing statutes in order to incorporate cryptoassets and distributed ledger technologies (DLT) into Swiss law. The main proposed changes are:

- in the Swiss Code of Obligations, uncertificated securities should be treated as securities if they were created on a digital ledger in order to increase legal certainty of transactions on a DLT-based platform;
- in the Federal Law on Debt Collection and Bankruptcy, the segregation of crypto-based assets in the event of bankruptcy is to be expressly regulated in order to increase legal certainty; and
- in the FMIA, a new authorisation category for so-called 'DLT trading facilities' is to be created – these are intended to be able to offer regulated financial market players and private customers services in the areas of trading, clearing, settlement and custody with DLT-based assets.

Government policy

How would you describe the government's general approach to the regulation of cryptoassets in your jurisdiction?

The government's general approach is to create the best possible framework conditions so that Switzerland can establish itself and evolve as a leading, innovative and sustainable location for fintech and DLT companies. Moreover, its goal is to consistently combat abuse, namely in the fields of money laundering and terrorist financing, and to ensure the integrity and good reputation of Switzerland as a financial centre and business location.

Thus, Switzerland and its laws and regulations are flexible and accommodating towards new technologies and

business models. Furthermore, the federal and cantonal legislative and governmental bodies are willing to accommodate such innovative approaches.

Regulatory authorities

Which government authorities regulate cryptoassets and businesses transacting with cryptoassets?

FINMA, as the regulator for Switzerland, is also competent for market supervision in the area of cryptoassets. For anti-money laundering-only supervision, financial intermediaries must join and be supervised by a private self-regulatory organisation which is recognised and supervised by FINMA. Further, portfolio managers are authorised by FINMA, but supervised by a private supervisory organisation authorised by FINMA.

FINMA has published guidelines regarding initial coin offerings (ICOs) dated 16 February 2018, in which FINMA also qualifies the different types of cryptoasset in three categories (see below). The ICO guidelines were supplemented on 11 September 2019 regarding stable coins.

Regulatory penalties

What penalties can regulators impose for violations relating to cryptoassets?

If the regulatory requirements are not observed, FINMA may impose sanctions (eg, initiate enforcement proceedings) stated in the Federal Act on the Swiss Financial Market Supervisory Authority. Possible measures include a requirement to restore compliance with the law, issuance of a declaratory ruling, prohibition from practising a profession, publication of the supervisory ruling, confiscation of an unlawful profit, appointment of investigating agents and revocation of licence or approval and liquidation of a company.

Often, acting without a required licence also constitutes a criminal act which will be prosecuted by the criminal prosecution authorities.

Court jurisdiction

Which courts have jurisdiction over disputes involving cryptoassets?

No specialised court has jurisdiction over cryptoassets. Depending on the law infringed, the civil, criminal or administrative courts may have jurisdiction at the federal or cantonal level.

In purely civil matters, parties may also agree on arbitration.

Legal status of cryptocurrency

Is it legal to own or possess cryptocurrency, use cryptocurrency in commercial transactions and exchange cryptocurrency for local fiat currency in your jurisdiction?

There are no restrictions in regard to the legal ownership, transaction or exchange of cryptocurrency. However, in some cases, anti-money laundering provisions or licence requirements may apply.

Fiat currencies

What fiat currencies are commonly used in your jurisdiction?

In Switzerland, the fiat currency (legal tender) is the Swiss franc, which is issued by the Swiss National Bank.

Industry associations

What are the leading industry associations addressing legal and policy issues relating to cryptoassets?

The Swiss Blockchain Federation, the Crypto Valley Association and the Bitcoin Association Switzerland are the leading associations in this field.

CRYPTOASSETS FOR INVESTMENT AND FINANCING

Regulatory threshold

What attributes do the regulators consider in determining whether a cryptoasset is subject to regulation under the laws in your jurisdiction?

According to the Swiss Financial Market Supervisory Authority (FINMA), the applicable regulation depends on the type of cryptoasset. In its initial coin offering guidelines, FINMA differentiates between the following types of cryptoasset:

- Payment tokens – payment tokens (synonymous with cryptocurrencies) are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value storage or transfer. Cryptocurrencies give rise to no claims on their issuer. Payment tokens do not qualify as securities. However, collecting or transferring such cryptoassets will usually be subject to the Anti-money Laundering Act (AMLA).
- Utility tokens – utility tokens are tokens which are intended to provide access (digitally) to applications or services by means of a blockchain-based infrastructure. If a utility token serves solely or partially as an investment in economic terms, FINMA will treat such tokens as securities (ie, in the same way as asset tokens).
- Asset tokens – asset tokens represent assets such as a debt or equity claim against the issuer. Asset tokens promise, for example, a share in future earnings or future capital flows of the issuing entity or the platform. In terms of their economic function, therefore, these tokens are treated analogous to equities, bonds or derivatives (securities). Generally, tokens which enable physical assets to be traded on a blockchain also fall into this category. FINMA regards asset tokens as securities, which means that there are securities law requirements for trading in such tokens, as well as civil law requirements under the Swiss Code of Obligations.

The individual token classifications are not mutually exclusive – for example, both asset and utility tokens can also be classified as payment tokens (referred to as 'hybrid tokens').

Depending on the type of cryptoasset, different laws may apply.

Investor classification

How are investors in cryptoassets classified and treated differently?

There are three main types of investor in connection with financial services according to the Financial Services Act

(FinSA):

- institutional clients, such as banks and securities houses;
- professional clients, such as financial professionals; and
- retail clients, which essentially refers to consumers who do not fall under the previous two categories.

High-net-worth individuals may declare to be treated as professional clients for investment purposes.

Initial coin offerings

What rules and restrictions govern the conduct of, and investment in, initial coin offerings (ICOs)?

No uniform law governs ICOs in Switzerland. Depending on the qualification of the specific cryptoasset, different provisions may apply. There are no requirement for an authorisation from FINMA to conduct an ICO, unless a cryptoasset is deemed to be a derivative or if the issuer has a repayment obligation. In such cases, an authorisation as a securities house or a banking licence may be necessary. The banking licence is the highest regulated category of financial market participation.

An ICO of a payment token triggers obligations under the AMLA. However, payment tokens qualify as securities as long as they are not (yet) operational on a blockchain.

An ICO of a utility token is not subject to the AMLA if the functionality of the token mainly pertains to access to a blockchain for mainly non-financial purposes. If a utility token functions solely or partially as an investment in economic terms, FINMA will treat such tokens as securities.

An ICO of an asset token may lead to the obligation to publish a prospectus or basic information sheet according to FinSA.

Generally, four stages in an ICO can be distinguished in Switzerland:

- Pre-financing stage – investors are offered only the prospect that they will receive tokens at some point in the future and the tokens or the underlying blockchain remain to be developed. There are no tokens that are transferable on a blockchain at this stage.
- Pre-sale (voucher) stage – investors receive tokens which entitle them to acquire or receive different tokens at a later stage (conversion/exchange required).
- Pre-operational stage – the tokens' main functionality is ready, but it cannot yet be used at the point of issuance because the application, platform or underlying blockchain remains to be developed or requires completion. No conversion of the tokens will be necessary once the development of the platform or underlying blockchain is completed.
- Operational stage – the tokens' main functionalities are ready and can actually be used in the intended way on a functional blockchain, application or platform at the point of issuance.

Security token offerings

What rules and restrictions govern the conduct of, and investment in, security token offerings (STOs)?

As stated above, the offering of cryptoassets qualifying as securities only leads to an authorisation requirement if the cryptoassets in question are derivatives or if an intermediary places the securities on behalf of the issuer in the primary

market (a securities house licence).

In connection with a public offering, according to the FinSA issuers of securities must publish a prospectus to be reviewed and approved by a reviewing body authorised by FINMA. Exceptions to this rule are specified in the FinSA and include:

- offerings to professional investors;
- offerings to fewer than 500 investors;
- offerings to investors that invest more than Sfr100,000;
- offerings of securities that have a minimal denomination of Sfr100,000; and
- offerings which are limited to a total amount of Sfr8 million.

Further, if securities are offered to retail investors, the issuer is generally required to draft a basic information document.

Stablecoins

What rules and restrictions govern the issue of, and investment in, stablecoins?

The regulation of the Swiss financial markets is technology neutral and principle based. For stablecoins, based on the stablecoin supplement to the ICO guidelines FINMA follows the same approach as is taken for blockchain-based tokens, focusing mainly on the economic function and purpose of a token ('substance over form'). Depending on the case, FINMA will follow the renowned principle of same risks, same rules, as well as the relevant features of each case.

Since stablecoins can vary considerably, the requirements under supervisory law may differ depending on which assets (eg, currencies, commodities, securities or real estate) the stablecoin is backed by or pegged to, and the legal rights of its holders. Banking, fund management, financial infrastructure, money laundering and securities trading regulations can all become relevant.

Airdrops

Are cryptoassets distributed by airdrop treated differently than other types of offering mechanisms?

Generally not, but in certain cases anti-money laundering provisions may apply. If the airdrop is done without any activity by the receiving party, the receiving party has made no investment decision and therefore there is generally no prospectus requirement.

Advertising and marketing

What laws and regulations govern the advertising and marketing of cryptoassets used for investment and financing?

Cryptoassets used for investment or financing usually qualify as securities and trigger the prospectus and basic information sheet requirements of the FinSA with the issuer and the duties of conduct under the FinSA at the point of sale with the financial services provider. In particular, advertising for financial instruments must be clearly recognisable as such. The advertising must refer to the prospectus and basic information sheet for the respective financial instrument.

In all other cases, there are no strict provisions regarding advertising. However, laws regarding unfair competition and criminal statues concerning fraud must be observed.

Trading restrictions

Are investors in an ICO/STO/stablecoin subject to any restrictions on their trading after the initial offering?

Generally not, except any potential transfer restrictions imposed by the issuer based on securities laws or derivatives trading obligations.

Crowdfunding

How are crowdfunding and cryptoasset offerings treated differently under the law?

In connection with Swiss regulations, four categories of crowdfunding must be differentiated: crowd-donating, crowdsupporting, crowdlending and crowdinvesting:

Generally, only the debt-based crowdlending and the equity-based crowdinvesting platforms are currently subject to the AMLA.

Crowdlending may lead to the requirement of a banking licence according to the Banking Act. However, depending on the amount of funds raised, certain exemptions and reliefs may apply. In particular, the so-called 'fintech licence' is available for innovative projects not collecting more than Sfr100 million from the public and neither investing those funds nor paying interest. This licence provides for many reliefs regarding capital and organisational requirements. Depending on the structure, crowdinvesting may trigger collective investment scheme regulations.

Transfer agents and share registrars

What laws and regulations govern cryptoasset transfer agents and share registrars?

There are no specific laws governing such services. Generally, the AMLA will have to be observed for transferring any kind of cryptoasset qualifying as a financial instrument. In particular, changing cryptocurrency into another cryptocurrency or fiat currency is considered to be money exchange or remittance, and therefore is subject to the AMLA. In addition, the provision of transfer services of cryptoassets will trigger anti-money laundering obligations if the service provider conveys over the private key of its clients.

Anti-money laundering and know-your-customer compliance

What anti-money laundering (AML) and know-your-customer (KYC) requirements and guidelines apply to the offering of cryptoassets?

The AMLA and the corresponding ordinance stipulate the obligations that must be performed by financial intermediaries subject to said laws.

As stated above, in general, only an ICO of a payment token or hybrid token with payment functions is subject to the AMLA. However, AML/KYC requirements are often triggered if a financial intermediary is involved in a transaction.

Natural or legal persons offering services regarding cryptoassets within the scope of the AMLA must join a self-regulatory organisation. Those private self-regulating bodies recognised by FINMA will impose their own rules and supervision regarding AML compliance on their members.

Within the scope of the AMLA, the following typical duties apply:

- client identification;
- verification of beneficial ownership;
- politically exposed person and sanction checks;
- source of funds;
- enhanced due diligence in the case of high risks or red flag within the client relationship. In the context of the additional clarifications, further background information on the business relationship must be obtained. Depending on the circumstances, the origin, intended use or background of the assets contributed or deducted, the origin of the assets or the business activities of the customer or the beneficial owner must be clarified;
- documentation duties;
- notification duties; and
- freezing of assets.

The extent of the aforementioned obligations may vary depending on the services or activities as well as on the amount of Swiss francs collected or transferred.

There are no specific rules, guidelines or established practices regarding the identification of the providence of cryptoassets or the proof of ownership of such assets. However, such checks must be performed in order to comply with the AMLA.

Sanctions and Financial Action Task Force compliance

What laws and regulations apply in the context of cryptoassets to enforce government sanctions, anti-terrorism financing principles, and Financial Action Task Force (FATF) standards?

The Federal Embargo Act and the corresponding ordinances regarding specific sanctions towards certain countries, people and organisations restrict the provision of certain services, the sale of goods and the financing of such persons. International sanctions imposed by the United Nations are directly applicable in Switzerland. These sanctions must be regularly observed, particularly when providing financial services. Business relationships with sanctioned persons may not be formed and if they have, they must be terminated.

Anti-terrorism financing principles of the United Nations and the FATF are implemented by the Federal Embargo Act and by the AMLA – in particular, the enhanced due diligence and notification duties.

CRYPTOASSET TRADING

Fiat currency transactions

What rules and restrictions govern the exchange of fiat currency and cryptoassets?

The professional purchase and sale of cryptoassets against fiat currencies (eg, Swiss francs), but also between different cryptoassets, constitute currency exchange (a two-party transaction) or money remittance (a three-party transaction) activity subject to the Anti-money Laundering Act (AMLA), unless they qualify as securities or utility tokens.

For example, in the case of money exchange transactions, where the value is more than Sfr5,000 the contracting party must be identified, and where the value is more than Sfr25,000 the beneficial owner must be identified. The exchanger must take appropriate measures to ensure that the wallet belongs to the customer (a two-party-transaction) and a third party, because otherwise it would constitute a money remittance activity and the identification obligation would apply from an amount of Sfr0 for outbound transactions and Sfr1,000 for inbound transactions.

With regard to payment token transactions, financial intermediaries must apply the travel rule based on the Anti-money Laundering Ordinance of the Swiss Financial Market Supervisory Authority on every transaction, including transactions to wallets held with unregulated wallet providers (ie, stating the name, address and wallet address of the sending party and the name and wallet address of the receiving party).

Trading in crypotassets which are securities, either on behalf of clients or privately (if certain turnover thresholds are being exceeded), generally requires a securities house licence. The licensing requirements also apply to the entity's public issuing of derivatives or placing of securities for issuers. The bilateral systematic internalisation of cryptoassets and related derivatives or financial instruments is subject to additional regulatory requirements under the Financial Market Infrastructure Act (FMIA).

Accepting client deposits generally requires a banking licence. Cryptocurrencies and their associated private keys may be deposits under the Swiss Banking Act.

Professional foreign exchanges dealers may not accept public deposits, without a banking licence. The same applies for cryptoasset dealers, who convey over the private keys of their clients. However, as stated above, depending on the amount of funds collected, a fintech licence may be obtained.

Exchanges and secondary markets

Where are investors allowed to trade cryptoassets? How are exchanges, alternative trading systems and secondary markets for cryptoassets regulated?

Bilateral trading (broker/dealer activities)
Licence requirements and duties of conduct: Professional trading in securities (ie, asset tokens) typically requires an authorisation according to the Financial Institutions Act as a securities house granted by FINMA. The detailed requirements and authorisation process depend heavily on the place of domicile of the securities house and the business activity pursued. A Swiss domiciled securities house is any legal entity or partnership that professionally sells or buys securities:

- on its own account on the secondary market with the intent of reselling them within a short period of time (eg, own-account dealers and market makers);
- on behalf of third parties (eg, client dealers);
- by publicly offering securities to the public on the primary market (eg, issuing houses); or
- by professionally creating derivatives and offering them publicly on the primary market (eg, derivatives houses).

Undertakings which acquire or dispose of payment or asset tokens in secondary trading on behalf of clients qualify as financial service providers according to the Financial Services Act (FinSA), and therefore are subject to the duties of conduct at the point of sale.

Derivatives trading obligations: Trading in cryptoassets that are derivatives may be subject to multiple derivatives trading obligations under the FMIA depending on the status of the counterparties involved, such as reporting, clearing and risk mitigation (eg, trade confirmation, portfolio reconciliation, portfolio compression, dispute resolution and valuation, as well as initial and variation margins).

Trading platforms – order matching
Centralised or decentralised trading platforms on which cryptoassets qualified as securities are traded usually require an authorisation as a financial market infrastructure (FMI) of the category of a stock exchange or multilateral trading facility. Only regulated participants may trade on such an FMI (ie, no retail clients).

An authorised bank or securities house may run an organised trading facility on which financial instruments other than securities may be traded. Organised trading facilities are also directly accessible to retail clients. Trading platforms for

payment tokens are not subject to an FMI licence if they offer only spot transactions. Trading only utility tokens triggers no FMI licence requirements as utility tokens do not qualify as financial instruments.

Trading platforms – clearing and settlement
Providing clearing and settlement services involving the power to dispose over private keys usually triggers banking regulations in connection with payment tokens, fiat currencies or securities house regulations in connection with asset tokens. Further, an entity that clears and settles payment obligations based on uniform rules and procedures could even require a FMI licence, similar to a payment system.

If an organised trading facility provides transaction settlement in connection with payment tokens or fiat currencies, it must keep client assets on settlement accounts for no longer than 60 calendar days to limit regulatory requirements to anti-money laundering duties. Insofar as such platforms also offer their customers the management of accounts (eg, for the settlement of margins) and thereby keep the cryptoassets in pooled accounts on the blockchain, a subordination under the Banking Act must also be examined. The fintech licence can be an attractive option for such ventures.

New developments
Since many distributed ledger technology (DLT)-based infrastructure has an integrated approach to exchange and post-trade services, the Federal Council has proposed the introduction of a new category of FMI tailored to the specifics of a DLT-based exchange of securities cryptoassets with direct access by retail clients.

Custody

How are cryptoasset custodians regulated?

Custody services in connection with only utility tokens are not regulated.

Normal custody of payment and asset tokens
Simple custody of asset tokens with the power to dispose over private keys is only subject to the AMLA. However, the activity of a central securities depository is subject to a licence from the FINMA. In contrast, the custody of payment token can additionally be subject to Swiss banking regulation, if the custody wallet provider maintains the private keys and does not fully segregate the tokens per individual client on a technical level (ie, not only on a book records level).

The custody of assets, whether cryptoassets or assets from the analogue world, does not in itself constitute a financial service within the meaning of Article 3(c) of the Financial Services Act (FinSA). This activity lacks, as a minimum, the requirement of the activity carried out for customers in relation to the acquisition or sale of financial instruments or the acceptance and transmission of orders relating to financial instruments or asset management activity. In particular, if the sole purpose of the asset transfer is safe custody and there is no power of attorney to invest them, there is no asset management.

Accordingly, a custody service provider is not covered by the FinSA as long as its service is limited to custody per se . However, if a sale of the tokens considered to be financial instruments is only possible via an account with the provider of custody services (eg, because the private key is located therein), a financial service pursuant to the FinSA is likely to exist.

Central securities depository of asset tokens
A central securities depository is a category of FMI subject to a licence by FINMA. It is the operator of a central custodian (ie, an entity for the central custody of securities and other financial instruments based on uniform rules and procedures) or a securities settlement system (ie, an entity for the central custody of securities and other financial instruments based on uniform rules and procedures).

Since a fully fledged security cryptoasset exchange usually intends to offer post-trading services requiring a licence as a central securities depository, it must be remembered that a legal entity is not allowed to hold two different FMI

licences. Thus, two legal entities would be required for such projects. However, the Federal Council has proposed the introduction of a specific category of FMI licence for DLT-based exchanges for cryptoassets. This approach would remedy the aforementioned problem of the requirement of multiple licences for such projects.

Broker-dealers

How are cryptoasset broker-dealers regulated?

Licence requirements and duties of conduct

Professional trading in securities (ie, asset tokens) typically requires an authorisation according to the Financial Institutions Act as a securities house granted by FINMA. The detailed requirements and authorisation process depend heavily on the place of domicile of the securities house and the business activity pursued. A Swiss domiciled securities house is any legal entity or partnership that professionally sells or buys securities:

- on its own account on the secondary market with the intent of reselling them within a short period of time (eg, own-account dealers and market makers);
- on behalf of third parties (eg, client dealers);
- by publicly offering securities to the public on the primary market (eg, issuing houses); or
- by professionally creating derivatives and offering them publicly on the primary market (eg, derivatives houses).

Undertakings which acquire or dispose of payment or asset tokens in secondary trading on behalf of clients qualify as financial service providers according to the FinSA, and therefore are subject to the duties of conduct at the point of sale.

Derivatives trading obligations

Trading in cryptoassets that are derivatives may be subject to multiple derivatives trading obligations of the FMIA depending on the status of the counterparties involved, such as reporting, clearing and risk mitigation (eg, trade confirmation, portfolio reconciliation, portfolio compression, dispute resolution and valuation, as well as initial and variation margins).

Decentralised exchanges

What is the legal status of decentralised cryptoasset exchanges?

The scope of regulations depends on the level of decentralisation of the different value chain services involved.

Trading/order matching

Order matching mechanisms are usually organised centrally, which often triggers a FMI licence requirement as stock exchange, multilateral trading facility or organised trading facility. In case of completely decentral solutions, no FMI licence is required.

Clearing and settlement

Often decentralisation refers to decentralised clearing and settlement processes (ie, peer-to-peer transaction clearing or settlement without involvement of the trading platform). Therefore, if the trading platform neither operates a smart contract involved in the transaction nor has any power to dispose over private keys during such transactions, generally anti-money laundering regulations and banking and securities house licence requirements are not triggered.

However, if the smart contract is operated by the corresponding trading platform and provides technical control and influence options, such decentralised trading platforms are, in accordance with FINMA practice, generally at least subject to the AMLA, as they have control over third-party assets through the confirmation, release or blocking of

orders.

Peer-to-peer exchanges

What is the legal status of peer-to-peer (person-to-person) transfers of cryptoassets?

Peer-to-peer transactions generally do not fall under the scope of the AMLA if the wallet service provider has neither the power to dispose over the private keys nor any other influence on the transaction or the smart contract conducting the transaction. However, if a wallet service provider can assert control over the assets of the participants or influence such transactions or the smart contract conducting such transactions, the AMLA will apply.

FMIA derivatives trading obligations are applicable to all (counter)parties of transactions with asset tokens qualifying as derivatives.

Trading with anonymous parties

Trading with anonymous parties

In general, the law does not prohibit trading with anonymous parities. However, FINMA Guidance 02/2019 "Payments on the blockchain" clarified that financial intermediaries doing orders with payment tokens must fully comply with the travel rule according to FINMA's Anti-money Laundering Ordinance and there is – contrary to the Financial Action Task Force recommendations – no exception in Swiss AML-regulations for payments involving unregulated wallet providers.

Foreign exchanges

Are foreign cryptocurrency exchanges subject to your jurisdiction's laws and regulations governing cryptoasset exchanges?

If a foreign stock exchange or multilateral trading facility enables trading of cryptoassets qualified as securities, it requires recognition by FINMA before it can grant access to Swiss-regulated participants.

Depending on the specific business model and structure, foreign trading platforms directly addressing unregulated Swiss clients must check whether:

- they provide a financial service and are therefore subject to the FINSA rules of conduct;
- they publicly offer financial instruments and are therefore subject to the FINSA prospectus and basic information sheet obligations; or
- the FMIA derivatives trading obligations apply in connection with derivatives transactions.

Under what circumstances may a citizen of your jurisdiction lawfully exchange cryptoassets on a foreign exchange?

Swiss law imposes no restrictions in this regard except that the Swiss client must check whether the FMIA derivatives trading obligations apply in connection with derivatives transactions.

Taxes

Do any tax liabilities arise in the exchange of cryptoassets (for both other cryptoassets and fiat currencies)?

In general, all types of cryptoasset and related transactions are subject to federal, cantonal and communal taxes, such as income, wealth and profit tax, stamp duty and withholding tax and value added tax (VAT).

In particular, the Federal Tax Administration:

- on 27 August 2019 published a working paper about cryptocurrencies and initial coin offerings and initial token offerings in connection with wealth, income and profit tax, as well as withholding tax and stamp duty, in which they must state that they are guided by the token classification of the FINMA initial coin offering guidelines; and
- on 1 January 2018 amended its brochure, VAT Information 04 to add a section about services in connection with blockchain and DLT.

CRYPTOASSETS USED FOR PAYMENTS

Government-recognised assets

Has the government recognised any cryptoassets as a lawful form of payment or issued its own cryptoassets?

The Swiss government has not declared any cryptocurrency as legal tender and has not yet issued its own cryptocurrency. However, every person is free to accept cryptoassets as a lawful form of payment and it can also be validly agreed to pay in cryptoassets on a contractual basis.

The canton of Zug has been dubbed 'Crypto Valley' and since 2017 has accepted Bitcoin and Ether as means of payment for defined fees (eg, at the Commercial Register Office of the Canton of Zug). The Swiss National Bank is assessing, through a project with SIX group, whether SIX group's digital exchange could use a digital currency issued by the Swiss National Bank for internal transaction settlement purposes.

Bitcoin

Does Bitcoin have any special status among cryptoassets?

No, it is not recognised as legal tender and falls under the (normal) token category of payment tokens.

Banks and other financial institutions

Do any banks or other financial institutions allow cryptocurrency accounts?

In general, Swiss banks and other financial institutions are allowed to provide cryptocurrency accounts. On the one hand, most banks and other financial institutions refuse to do so because they assume the regulatory risks to be too high and because they often do not have the required know-how. On the other hand, the Swiss Financial Market Supervisory Authority (FINMA) has already granted two full-bank/securities house licences to Swiss institutions mainly focused on crypto-based financial services, including providing cryptocurrency accounts. A certain number of bank

licence, securities dealer licence and fintech licence applications are still pending with FINMA. There are also further crypto storage service providers in the market being structured in a way that does not require a banking or securities house licence.

CRYPTOCURRENCY MINING

Legal status

What is the legal status of cryptocurrency mining activities?

The mining of tokens in itself does not constitute a financial service within the meaning of Article 3(c) of the Financial Services Act (FinSA). It does not fulfil the requirement of an activity performed for clients with respect to the acquisition or the sale of financial instruments, or the acceptance and brokering of orders involving financial instruments, at least in cases where the mined tokens do not constitute financial instruments in accordance with the FinSA. If, for example, cryptoassets with the sole function of a cryptocurrency are mined, the miner is not a financial service provider in accordance with Article 3(d) of the FinSA.

By contrast, if cryptoassets are mined that constitute financial instruments within the meaning of the FinSA, the classification of a miner as a financial service provider depends above all on how close and concrete the client relationship is in terms of a contractual relationship. The mandate must focus in practical terms on the purchase or sale of financial instruments or the acceptance and brokering of orders that involve financial instruments.

The earnings from token mining (in tokens or transactions fees) are generally not subject to anti-money laundering regulations provided that they are used for private purposes.

Government views

What views have been expressed by government officials regarding cryptocurrency mining?

The Federal Council has explicitly addressed cryptocurrency mining in its distributed ledger technology report published on 14 December 2018 and in its Report on Virtual Currencies published on 25 June 2014, namely in regard to anti-money laundering provisions and the offering of financial services according to the FinSA. No additional official comments have been made so far.

Cryptocurrency mining licences

Are any licences required to engage in cryptocurrency mining?

In Switzerland, cryptocurrency mining is generally not subject to authorisation under the financial market legislation.

Taxes

How is the acquisition of cryptocurrency by cryptocurrency mining taxed?

If the mining activity qualifies in the specific case as a commercial or a gainful activity, earnings from cryptocurrency mining fall within the scope of income or profit tax and the income or profit generated therefrom is considered taxable income or revenue on a federal, cantonal and communal level. Further, holding cryptocurrency is subject to wealth tax.

BLOCKCHAIN AND OTHER DISTRIBUTED LEDGER TECHNOLOGIES

Node licensing

Are any licences required to operate a blockchain/DLT node?

The operation of a node within a decentralised blockchain or distributed ledger is generally not subject to authorisation requirements. However, in certain cases, authorisation as a central security depository can be necessary if a central node is operated within a permissioned DLT-based platform. Further, if nodes are operated within centralised networks, a careful assessment of Swiss financial market regulation requirements is necessary.

Restrictions on node operations

Is the operation of a blockchain/DLT node subject to any restrictions?

There are no known specific restrictions regarding node operations within distributed or decentralised blockchains or distributed ledgers.

DAO liabilities

What legal liabilities do the participants in a decentralised autonomous organisation (DAO) have?

A DAO is commonly understood as an example of a smart contract in which the smart contract can autonomously dispose of the resources of an organisation. The governance of the organisation is described in the smart contract, ensuring that the organisation behaves as described.

However, a DAO is not a fixed term in Swiss law and has no defined structure. Therefore, it must be analysed in detail based on the specific characteristics on a case-by-case basis.

In many cases, especially when an asset is raised from several users in order to finance the DAO and its activities and if these users have voting rights, a DAO often has features of a collective investment scheme and thus diligent analysis is required. Further, in many cases, a DAO can qualify as a simple partnership since, according to the Code of Obligations, the letter is a 'catch-all' provision.

DAO assets

Who owns the assets of a DAO?

Since DAOs are not explicitly defined in Swiss law and have no specific structure, an assessment of the ownership of assets must be made on a case-to-case basis, taking the applicable laws into account.

Open source

Is DLT based on open-source protocols or software treated differently under the law than private DLT?

With regard to financial market regulations, there is no distinction between those two scenarios.

Smart contracts

Are smart contracts legally enforceable?

The application of classical private law to smart contracts raises questions due to the automated and unchangeable nature of contract fulfilment technology. First, the exchange of mutual expressions of the parties does not take place in the conventional way: each party expresses a will and the system serves as an intermediary. Thus, the computer system plays an important role in the contract formation process, but is not a contracting party. According to prevailing doctrine, neither party can conclude a contract with only the computer system, as this has no legal personality within the meaning of the Swiss Civil Code and thus does not qualify as a potential counterparty. The application of the relevant provisions on performance of the contract to a smart contract also raises questions.

Thus, in the event of a failure to perform or improper performance of the contract, the question of liability arises – for example, liability for programming or machine errors despite correct programming. The question also arises as to whether the application of Articles 197 (warranty for defects in the purchased item) and 367 (liability for defects in connection with performed work) of the Code of Obligations is possible in certain cases of technical programme defects.

Finally, the anonymity of the parties, inherent in blockchain technology, constitutes a major obstacle to the implementation of the existing contractual provisions. If a contracting party wishes to assert its rights, it must be able to identify its counterparty. At present, the doctrine recommends that parties conclude a smart contract with suitable mechanisms for changing circumstances and settling disputes. There will certainly be further developments in the area of smart contracts, but these are still at an early stage.

Patents

Can blockchain/DLT technology be patented?

According to Swiss law, software (with a certain complexity) is automatically protected by Swiss copyright law, without the need for registration. In general, most software will be protected by copyright law.

The registration of a software patent is not usually possible and, in light of the aforementioned facts, is not necessary to gain adequate protection.

UPDATE AND TRENDS

Recent developments

Are there any emerging trends, notable rulings or hot topics related to cryptoassets or blockchain in your jurisdiction?

The Libra Association, created by Facebook, intends to launch its new cryptocurrency. According to the Swiss Financial Market Supervisory Authority (FINMA), at minimum Libra will require authorisation as a payment system. A particular focus of FINMA is the application and proper implementation of anti-money laundering and counter-terrorism financing regulations. The need for further case-specific supervision in this area depends on how the Geneva-based Libra Association plans to manage its funds, and who would bear the risk of losses according to FINMA. It could conceivably need additional authorisation as a collective investment scheme, such as a fund or even as a bank.

The Federal Council published a detailed report on the legal framework for distributed ledger technology (DLT) and blockchain on 14 December 2018. Based on this report, the Federal Council has adopted the dispatch on the further

improvement of the framework conditions for DLT/blockchain on 27 November 2019. The dispatch introduces specific amendments to nine federal acts, covering both civil law and financial market law, in order to enable Swiss law to better accommodate DLT/blockchain projects and providing legal certainty for all market players.

Most notably, the proposed amendments will introduce a so-called 'register-uncertificated security' within the Swiss Code of Obligations, which can be transferred solely according to the rules of the respective register.

Further amendments are proposed to the Banking Act, the Financial Market Infrastructure Act, the Act on Collective Investment Schemes, the Anti-money Laundering Act, the Financial Institutions Act and the Act on Intermediated Securities.

These proposed amendments will be discussed in the Swiss Parliament in Spring 2020. The entry into force of the proposed amendment is not to be expected before 1 January 2021.

LAW STATED DATE

Correct on

Give the date on which the above content is accurate.

16 December 2019.