

SWITZERLAND

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Background

Guidance

Contributed by:	<p>Lalive</p> <p>Roesle Frick & Partners</p> <ul style="list-style-type: none">• André Brunschweiler• Dr. Martin K. Weber
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1. How are crypto assets defined in your jurisdiction?	<p>Currently, there is no general legal definition of cryptocurrencies under Swiss legislation.</p> <p>The Swiss Blockchain Taskforce, a group of Swiss legal experts in the areas of blockchain and ICO, defines crypto assets or tokens as <i>«digital units that are issued directly on a blockchain and exist as part of a protocol of a (usually publicly visible) database that documents the existence and transfer of the tokens»</i>.</p> <p>In matters of banking regulations, crypto-based assets are defined by the revised Ordinance on Banks (OB) as assets that, actually or pursuant to the intention of the originator or issuer, were issued with the primary intention to substantially serve as (i) a payment instrument for the acquisition of commodities or services, or (ii) an instrument for money or value transfers (see article 5a OB together with articles 16(1bis) let. b of the Federal Banking Act).</p>

In debt enforcement and bankruptcy matters, crypto-based assets are defined as all assets «*for which the power of disposal is conveyed exclusively via a crypto-based access procedure*» (article 242a of the Federal Act on Debt Enforcement and Bankruptcy (DEBA)).

Similarly, the Swiss Financial Market Supervisory Authority (FINMA) describes crypto-based assets as digital assets that are usually mapped on a blockchain and that can only be accessed using a crypto-based access procedure.

In its Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (FINMA ICO Guidelines) of February 2018 and in their Supplement of September 2019 (FINMA Guidelines Supplement), FINMA classified and defined three main categories of crypto assets based on their economic function as follows (the Federal Tax Administration and the Swiss Blockchain Taskforce also use the same categories):

1. *Payment tokens* (i.e., pure cryptocurrencies such as Bitcoin) are defined as tokens which are intended to be used, now or in the future, as a means of payment for acquiring services or goods or as a means of money or value transfer.
2. *Asset tokens* are tokens that represent assets such as a debt or equity claim on the issuer. These tokens promise, for example, a share in future capital flows or future company earnings.
3. *Utility tokens* are defined as tokens that are intended to provide access digitally to an application or a service by means of a block chain-based infrastructure.

In addition to the three main categories, FINMA further defined stable coins as tokens which are frequently linked to an underlying asset (such as fiat currency) and of which the objective is to minimize price volatility of currently available payment tokens.

Tokens can fall into more than one of these categories (*hybrid tokens*).

Finally, ledger-based securities (DLT securities) (see also question Nr. 3) are defined as rights which, in accordance with an agreement between the parties, are (i) registered in a securities ledger and (ii) may be exercised and transferred to others only via this securities ledger (see article 973d Code of Obligations).

2. What is the legal status of crypto assets in your jurisdiction?

There was a scholarly debate about the legal status of crypto assets, namely whether the rules on chattels should apply, which was rejected.

According to the prevailing doctrine, crypto assets or tokens are assets (values or carriers of values). This abstract qualification of tokens is also endorsed by the Federal Council in its report on the legal basis for distributed ledger technology and blockchain in Switzerland. See also question Nr. 3.

Cryptocurrencies, more specifically, are considered “purely factual intangible assets” in Switzerland. They are currently not part of Swiss legal tender.

3. Are crypto assets regulated in your jurisdiction?

Crypto assets and related activities are not prohibited in Switzerland. On the contrary, Switzerland has attracted substantial investment in the crypto field (crypto valley).

In 2021, the Federal Act on the Adaptation of Federal Law to Developments in Distributed Electronic Register Technology (DLT Act) and the associated ordinance (DLT Ordinance) were adopted to introduce security rights registered on a blockchain, increase legal certainty in the event of bankruptcy, create a new licence category for blockchain-based trading systems, and provide a proportionate response to the risks identified in the area of money laundering and terrorist financing.

Accordingly, the DLT Act allows for the selective adaptation of various existing federal regulations, including in the Swiss Code of Obligations (CO), the Federal Act on Debt Enforcement and Bankruptcy (DEBA), the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FinMIA) and the Federal Act on Combating Money Laundering and Terrorist Financing (AMLA) (see question Nr. 4).

Still, the introduction of a comprehensive, tailor-made regulation for cryptocurrencies has not been considered necessary yet in Switzerland, due to the rapid development of the technology and the flexibility of the existing legal framework.

To increase legal certainty, the DLT Act amended Swiss securities law and introduced ledger-based securities (DLT Securities). DLT-Securities allow for the structuring as registered securities of all rights that could be securitised in traditional securities until now. In principle, all claims can thus be securitised in securities. Utility tokens and stable coins, which usually represent a claim under civil

law against the issuer, can therefore be securitised. However, pure cryptocurrencies or crypto-based means of payment, which are not issued by an issuer and are considered «purely factual intangible assets», are not included.

With the introduction of the DLT Act, various federal regulations were selectively adapted, including the following:

- Securities Law: The DLT Act introduced ledger-based securities (DLT Securities, see question Nr. 2), placing the trading of rights by means of manipulation-resistant electronic registers on a secure legal basis (articles 973d et seq. CO).
- Debt Enforcement and Bankruptcy Law: The DLT Act confirmed the segregation of crypto-based assets from the bankruptcy estate in the event of bankruptcy (articles 242a et seq. DEBA).
- Financial Market Infrastructures Law: The DLT Act created a new authorisation category for DLT/blockchain-based trading systems within the framework of financial market supervision (DLT Trading Facilities) pursuant to articles 73a et seq. FinMIA.
- Anti-Money Laundering Regulations (Anti-Money Laundering Act, AMLA; and ordinance to supplement the AMLA law, AMLO): The DLT Act addressed identified risks in the area of money laundering and terrorist financing and amended the corresponding regulations (see question Nr. 5).

4. If crypto assets are regulated in your jurisdiction, which key regulatory authorities are responsible for the regulations and their enforcement in your jurisdiction? How are they regulated?

The Swiss Financial Market Supervisory Authority FINMA (FINMA) monitors the implementation of financial market regulations by financial intermediaries and issues guidelines for subordination requests.

If FINMA receives specific indications that an activity involving crypto-based assets is being carried out without the necessary FINMA requirements or licences, it will initiate investigations and, if needed, start enforcement actions which may go as far as liquidating the entity concerned.

FINMA also monitors compliance with anti-money laundering regulations by financial service providers such as DLT Trading Facilities pursuant to article 73a FinMIA (see question Nr. 5).

1 Violations of supervisory licensing requirements and anti-money laundering and terrorist financing provisions are a criminal offence, and their observation is also enforced by criminal authorities.

5. Have specific anti-money laundering measures been introduced in relation to crypto asset activities in your jurisdiction?

In order to be subject to the Anti-Money Laundering Act (AMLA), a person or company must be a «financial intermediary», which include all natural persons and legal entities who professionally accept or hold third-party assets or help to invest or transfer them.

Under Swiss law, both the issuing of payment tokens as well as the subsequent trading of such tokens may be subject to AMLA regulations. However, there are no specific cryptocurrency related AMLA regulations. If asset and utility tokens classify as payment tokens (referred to as hybrid tokens), they are deemed to be both securities and means of payment. In such cases, ledger-based securities (DLT Securities) may also be subject to AMLA regulation.

With the Federal Act on the Adaptation of Federal Law to Developments in Distributed Electronic Register Technology (DLT Act), a new licence category for DLT Trading Facilities (article 73a FinMIA) was introduced, which can perform activities that are considered as financial intermediation regulated under special law and thus fall under the AMLA.

According to FINMA, the issuing of payment tokens constitutes the issuing of a means of payment and is thus also subject to the AMLA if the tokens can be transferred technically on a blockchain infrastructure.

The ordinance to supplement the AMLA (AMLO), revised with the adoption of the DLT Act, further stipulates that assistance provided by financial intermediaries in connection with the transfer of virtual currencies to a third party are services related to payment transactions subject to the AMLA if they maintain a permanent business relationship with the contracting party or if they exercise power of disposal over virtual currencies on behalf of the contracting party, if the service is not provided exclusively to adequately supervised financial intermediaries. This applies, for instance, to wallet providers who have one of the private keys to which they have access and with which a signing of the transaction is necessary before it can be successfully carried out.

The simple payment of services or goods in cryptocurrencies and the corresponding performance against payment in cryptocurrencies do not constitute financial intermediation and are therefore not subject to the AMLA.

The AMLA and the AMLO establish a series of obligations which financial intermediaries must adhere to. With the introduction of the DLT Act, these obligations were expanded to financial intermediaries active in relation with crypto assets. These obligations include verification (of the identity of the beneficial owner or of a customer) and reporting duties.

Financial intermediaries belonging to the banking sector (such as banks, securities firms, and insurance companies) are subject to a comprehensive, prudential regulation by FINMA, which monitors their compliance with anti-money laundering regulations.

Other financial intermediaries who do not belong to the banking sector, such as credit card companies, must join a self-regulatory organization approved and supervised by FINMA to monitor compliance with due diligence and reporting obligations under the AMLA.

6. How is the use of blockchain in the financial services sector regulated in your jurisdiction?

The mere purchase and sale as well as the use of crypto-based assets as a means of payment for goods and services is not regulated in Switzerland under financial market law. DLT-based applications have numerous points of contact with financial market law, specifically banking law, financial market infrastructure law, collective investment scheme law, insurance law and the Federal Act on Financial Services (FinSA) and the Federal Act on Financial Institutions (FinIA).

Financial market law in Switzerland is technology-neutral and therefore no fundamental adjustments had to be made in view of the DLT technology. The DLT Act introduced, however, punctual adaptations of financial market laws, including the following (in addition to the list above under question Nr. 3):

- Banking Act (BA): In view of the introduction of a segregation regulation for digital assets under the insolvency law in the Federal Act on Debt Enforcement and Bankruptcy (DEBA), corresponding provisions were introduced for the treatment of tokens and comparable assets under banking insolvency law.
- Financial Services Act (FinSA): Due to the introduction of DLT securities in the securities law (cf. article 2(bbis) number 2 Financial Market Infrastructure Act (FinMIA)), the legal definition of "securities" in the FinSA was adjusted to clarify that securities also come into being on the basis of ledger-based securities.

Generally speaking, certain tokens (typically asset tokens) may qualify as “securities” and thus as “financial instruments” in Switzerland. The ICO

Guidelines issued by FINMA indicated that it does not intend to qualify cryptocurrencies as securities within the meaning of FinSA as they are not analogous in their function to traditional securities. Cryptocurrencies typically do not grant the respective holders/users any relative or absolute rights vis-à-vis an issuer or a third party and function merely as storage of value and mediums of exchange.

7. How are crypto assets taxed in your jurisdiction?

Crypto assets held by individuals or entities in Switzerland are subject to taxation in Switzerland. The practice of the tax authorities is constantly evolving. The Federal Tax Authority (FTA) regularly issues working papers, the latest of which was published in December 2021.

In short, the FTA treats digital currencies in the same way as Swiss francs or money in foreign currency for VAT purposes. This also means that trading in or exchange of cryptocurrencies is neither a supply of goods nor a service for VAT purposes, but rather a non-consumable means of payment, and is therefore VAT-exempt.

The working paper is based on the three basic categories of tokens provided by the FINMA ICO Guidelines (see question Nr. 1).

8. Are crypto assets recognized as a type of property in your jurisdiction?

According to the prevailing doctrine, mainly for their lack of tangibility, crypto assets are not considered a property and there can be no rights in rem to data. Crypto assets are considered assets in Switzerland.

9. How does your jurisdiction deal with the application of property laws to intangible assets and conflicts of laws with other jurisdictions (for example, a crypto asset created by a company in jurisdiction A, one a server in jurisdiction B that is sold to a person in jurisdiction C)?

The Federal Act on the Adaptation of Federal Law to Developments in Distributed Electronic Register Technology (DLT) and the associated ordinance provide for, among other, security rights registered on a blockchain and segregation of crypto assets in the event of bankruptcy.

According to the Federal Act on Private International Law (PILA), jurisdiction and arbitration clauses require consensus of the parties and proof of an agreement by text, whereas the participation in an access-free blockchain does usually not constitute consent and whereas the proof by text in case of an agreement in a smart

contract is controversial. Choice-of-law clauses are also possible in principle, provided that consent can be established. Foreign decisions related to crypto assets may be enforced in Switzerland if the necessary requirements are met.

If the parties of an agreement concerning crypto assets have not agreed on a jurisdiction or arbitration clause or a choice-of-law clause, the statutory rules of the PILA apply. Where the statutory rules of jurisdiction require a qualification of the dispute or the nature of a contract to determine the applicable law or jurisdiction, this qualification may be made on the basis of the function of the crypto asset in the individual case. For instance, tokens can get classified based on the legal relationship underlying the issuance and trading of the token.

10. Can smart contracts transferring ownership on a crypto asset be treated as legally binding in your jurisdiction?

Under Swiss law, contracts transferring ownership on a crypto asset can be treated as legally binding, provided that the contracting parties are individualizable, identifiable and there is an exchange of concurrent declarations of intent.

A contract always presupposes a consensual mutual expression of will by the parties. Swiss courts interpret and construe an agreement in accordance with the principle of good faith. In doing so, the courts consider elements in addition to the wording of the relevant provisions of such agreement, including, but without limitation, the circumstances under which such agreement was entered into, and the real intention of the parties thereto as mutually understood or as to be understood in good faith.

1 According to the prevailing Swiss legal doctrine, a smart contract is a computer program based on blockchain technology that runs automatically as soon as certain conditions are met. Accordingly, a smart contract itself is not a contract in the legal sense. However, it can serve for the conclusion or execution of actual contracts. The mere use of a computer program does, however, usually not qualify as a declaration of intent.

11. Is it possible to take security over a crypto asset in your jurisdiction? If so, please provide a brief overview.

In Switzerland it is possible to take security over crypto assets.

Under Swiss law, crypto assets are not considered chattels but usually qualify as transferable claims or other rights. Accordingly, crypto assets can be pledged.

Disposition rights over DLT securities can be transferred for the purpose of creating a security. A security can further also be established without transferring the disposition rights, provided that (i) the collateral is visible in the register of security interests, and (ii) it is ensured that only the collateral taker can dispose of the registered DLT securities.

DLT securities that, with the debtor's consent, are in the possession of a creditor may be retained by the creditor until satisfaction of the relevant claim due (right of retention). For instance, a DLT trading system as custodian may retain and realise registered DLT securities if a claim against the holder of respective DLT securities is due.

12. Does inheritance tax relief exist in your jurisdiction for situations where fluctuations in the market result in a beneficiary paying disproportionate tax?

In Switzerland, tax sovereignty concerning inheritance tax does not lie with the federal government but with the canton and the municipality in which the deceased had his or her last residence. There are cantons that do not levy any inheritance tax at all. However, in those cantons that levy an inheritance tax, the tax is calculated on the basis of the market value of the assets concerned at the date of inheritance.

There is no general inheritance tax relief for situations where fluctuations in the market result in a beneficiary paying disproportionate tax. However, heirs can reject an inheritance in order not to have to assume debts.

13. Is there any forthcoming or proposed legislation in your jurisdiction relating to crypto assets?

In 2021, the Federal Act on the Adaptation of Federal Law to Developments in Distributed Electronic Register Technology (DLT Act) and the associated ordinance (DLT Ordinance) were adopted to introduce security rights registered on a blockchain, increase legal certainty in the event of bankruptcy, create a new licence category for blockchain-based trading systems, and provide a proportionate response to the risks identified in the area of money laundering and terrorist financing. Beyond this, there are currently no other legislative projects in this area, and the Swiss legislator currently limits itself to monitoring further developments in close contact with the industry.

14. Is there a supranational view on crypto assets in your region and if so, what is it?

The federal regulator attaches importance to ensuring that crypto assets are subject to the same rules as real monetary assets, e.g., in the area of combating money laundering.

15. Is there anything else that you think is unusual or different about how your jurisdiction treats crypto assets or dealings in crypto assets?

Switzerland does not regulate the technology but rather, where necessary, the activities carried out with the help of the technology (principle of technology neutrality).

Furthermore, in August 2019, the Swiss Financial Market Supervisory Authority FINMA granted full banking and securities dealer licenses to two new financial institutions focusing on services in the area of crypto currencies and other digital assets, Sygnum Bank AG and SEBA Crypto AG.

Today, Switzerland is home to a dynamic blockchain ecosystem with over 1,000 companies focusing on distributed ledger technology and blockchain.

DISCLAIMER:

This guide contains summaries of general principles of law. It is not a substitute for specific legal advice and should not be relied upon in relation to the application of the law or subject matter covered.