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Switzerland

BLOCKCHAIN

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This country-specific Q&A provides an overview of blockchain laws and regulations applicable in Switzerland.

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SWITZERLAND
BLOCKCHAIN

1. Please provide a high-level overview of the blockchain market in your jurisdiction. In what business or public sectors are you seeing blockchain or other distributed ledger technologies being adopted? What are the key applications of these technologies in your jurisdiction?

Distributed ledger technology is seeing an ever increasing – experimental and practical – application in various industry sectors in Switzerland. The financial sector (fintech and insurtech) is at the forefront of blockchain and smart contracts adoption, with various businesses engaging in services relating to crypto currencies and other digital assets (e.g. asset management, trading and exchange services, custody and storage solutions) as well as the tokenisation of securities such as shares and bonds. This is a highly regulated sector and therefore sound legal review and structuring is essential. However, there are also significant developments in other areas such as e-governance (e.g. e-voting systems, electronic signing), document authentication, legal services (legaltech) as well as (re)insurance services. Key players in Switzerland include, amongst others, Bitcoin Suisse, which offers prime brokerage, trading, lending and custody services. The Crypto Finance Group provides brokerage, asset management and storage services. Further, SEBA and Sygnum are two Swiss “crypto banks”. Bancor is a blockchain protocol that allows users to convert different currencies directly and instantly without the need for an exchange. Cardano is developing a smart contract platform. Further, the company Nexo, which reached unicorn status, is active in the lending business. In addition, Solana is an open-source project that makes use of blockchain technology’s permission-less nature to provide decentralized finance (DeFi) solutions. In some use cases it might be questioned whether the distributed ledger technology in fact brings added value in comparison to a centralized system or whether the application of the technology is rather a marketing feature.

The public sector in Switzerland closely follows and supports developments in the area of blockchain, and some public institutions have already adopted blockchain-based solutions, in particular with regard to public registries. For instance, in a pilot project in the context of the digitalswitzerland challenge in 2018, the commercial registry of the Canton of Zug managed to complete the entire process of establishing a company limited by shares using smart contracts and digital workflows within a period of three hours. In the Canton of Geneva, the commercial registry has begun issuing company excerpts whose authenticity can be verified using blockchain technology. Further, the Canton of Zug accepts the payment of public fees in Bitcoin and Ether and, starting in the year 2021, the tax authorities in Zug also accept Bitcoin and Ether as a consideration for tax payments up to an amount of CHF 100,000. The Canton of Zug further successfully executed a first proof-of-concept of its e-voting platform that is based on the Hyperledger Fabric network, demonstrating its openness for innovation and commitment to the potential of blockchain technology.

Diem (formerly “Libra”) was one of the most highly publicised Swiss-based projects in the blockchain sector. The Geneva based Diem Association, with a membership base composed of a diverse and geographically distributed group of major business organisations, venture capitalists and non-profit organisations, aims to create a new, global DLT-based payment system and financial infrastructure. In May 2021, Diem withdrew from the licensing process with the Swiss Financial Market Supervisory Authority (“FINMA”) to obtain an authorisation as a payment system in Switzerland, which was already at an advanced stage (see public announcement of FINMA dated 12 May 2021).

2. To what extent are tokens and virtual assets in use in your jurisdiction? Please mention any notable success stories or failures of applications of these technologies.

The greater area around the cities of Zug and Zurich has been highly successful in attracting blockchain business and fostering the development of a significant ecosystem of start-ups and more mature companies focusing on the topic (dubbed the Swiss "Crypto Valley" and home, inter alia, to the challenger banks Sygnum Bank AG and SEBA Bank AG as well as the veteran blockchain enterprise Bitcoin Suisse AG). However, also the city of Geneva is a significant hub for blockchain projects (home, inter alia, of the asset tokenisation project Mt. Pelerin and commodities trading consortium Komgo).

In an initial phase, the Crypto Valley became known as an attractive base for companies wishing to conduct initial coin offerings (ICOs). These projects drew the interest of a broad range of investors and, in some cases, significant amounts in funding were collected (see also question 12). As of 2018, however, the enthusiasm in the ICO market cooled down considerably. Part of this development was initially attributed to the general decrease in crypto currency values, but it must also be seen as a sign of the growing awareness regarding the legal and regulatory framework that applies to ICOs and other types of token or coin offerings, and the challenges and limitations associated with conducting such fundraisings in a compliant manner. With the general rise in crypto markets in 2021, however, the valuation of the top 50 crypto companies in Switzerland increased by 680% compared to 2020, reaching an aggregate valuation of USD 37,5 billion. Currently, there are 11 unicorns in Switzerland (i.e. projects valued at more than USD 1 billion), e.g. Ethereum, Cardano, Polkadot, Solana, Tezos, Dfinity and Nexo (www.cvvs.com, CV VC Top 50 Report, 28 February 2021).

Blockchain business in Switzerland now appears to be defined by more mature projects, many of which are backed or launched by established financial institutions and technology companies. The new wave of blockchain start-ups in the financial sector more readily accepts and embraces regulation, with several projects having been granted a license by FINMA. In August 2019, two Swiss start-up companies, SEBA Bank AG and Sygnum Bank AG, were granted full Swiss banking and securities dealer licenses by FINMA. In September 2020, FINMA granted Sygnum Bank AG permission to operate an organized trading facility that enables trading in digital assets. Further, FINMA in September 2021 approved the first Swiss crypto fund (Crypto Market Index Fund). The fund mainly invests in crypto assets with significant trading volumes. New trends include the use and issuance of NFTs. A notable Swiss initiative include Hashmasks, a digital art collectible represented by NFTs.

FINMA generally displays a positive attitude towards projects in the blockchain sector, while at the same time being committed to ensuring and enforcing compliance with existing Swiss financial regulation. Publicised enforcement cases include e.g. the matter of envion AG, which was found by FINMA to have unlawfully accepted deposits amounting to over CHF 90 million from at least 37,000 investors in an ICO without the required licence, seriously violating supervisory law (FINMA media release, 27 March 2019), as well as the shutdown of providers of a "fake" crypto currency in late 2017 (FINMA media release, 19 September 2017) (see also question 20). In its 2018 Enforcement Report, FINMA noted that it has seen a sharp increase in the number of investigations into institutions suspected of operating without a licence and that it has been reviewing the regulatory classification of blockchain-based business models in particular (FINMA Enforcement Report 2018, p. 2). In its 2020 Annual Report, FINMA stated prominently that it will in particular focus on the compliance of crypto projects with applicable anti-money laundering regulation, specifically the so-called "travel rule" in connection with payments made on the blockchain (see also question 20).

3. To what extent has blockchain technology intersected with ESG (Environment, Social and Governance) outcomes or objectives in your jurisdiction?

Due to the high energy consumption of many blockchain architectures, some companies currently consider cryptocurrencies as non-sustainable and not compatible with their ESG strategy. Against this backdrop, projects that make use of technologies that are lower in energy consumption (e.g. due to the transition from a proof-of-work to a proof-of-stake consensus mechanism) are on the rise. In response to a request of a member of Swiss parliament made in 2019, the Federal Council drew up a report regarding the energy consumption of blockchain projects in 2021. According to this report, the energy consumption of Swiss blockchain systems cannot be quantified and the actual use of energy predominantly occurs abroad where the relevant computing infrastructure is located. While the Federal Council noted the existing initiatives to support energy-sufficient computing infrastructure, it also stated that the ongoing increase in energy consumption is only partially related to Swiss crypto companies or transactions made on the blockchain.

4. Has COVID-19 provoked any novel applications of blockchain technologies in

your jurisdiction?

Applications of blockchain technology in response to the COVID-19 pandemic are being considered by various developers, e.g. in the areas of remote work or education, alternative payment systems or contact tracing. During the public tender process conducted by the Federal Office of Public Health relating to a solution for a COVID-19 certificate, also one blockchain-based solution was presented. However, the federal office decided on another solution that is not based on distributed ledger technology.

5. Please outline the principal legislation and the regulators most relevant to the use of blockchain technologies in your jurisdiction. In particular, is there any blockchain-specific legislation or are there any blockchain-specific regulatory frameworks in your jurisdiction, either now or envisaged in the short or mid-term?

On 1 August 2021, the Federal Act on the Adaption of Federal Law to Developments in the Technology of Distributed Electronic Registers ("DLT Act") came into force. The DLT Act is a framework act comprising of a bundle of amendments to various existing Swiss federal acts, including, e.g., the civil securities law, financial regulation, banking law, insolvency law.

One of the key elements of the DLT Act is the creation of a legal basis for so-called uncertificated register value rights on the basis of a distributed ledger. These will fulfil the same functions as securities and will enable a more legally sound tokenisation of assets. Further, the DLT Act creates a new regulatory licence category for DLT trading facilities (see also question 7).

Even with the DLT Act, there is no specific, comprehensive regulation exclusively addressing the use of blockchain technology or virtual currencies in Switzerland. However, the Swiss financial regulatory framework, in particular, is generally principle-based and technology-neutral, eschewing overly prescriptive or detailed rules. This has been perceived as conducive to innovation in the financial sector while at the same time creating a level playing field between traditional players and (potential) disruptors. On this basis, for all intents and purposes, blockchain-based financial services businesses have to comply with the same rules and regulations as brick-and-mortar or online institutions that do not make use of this technology. Depending on the specifics of a particular business model, in particular, Swiss regulation on banking, securities, AML, collective investment schemes, financial services, financial institutions, insurance, consumer credit or financial market infrastructures may apply. Furthermore, Swiss data protection legislation must be observed.

To provide some guidance on the applicability of financial market laws to blockchain-based activities, FINMA has established guidelines for the legal qualification and treatment of virtual or digital currencies ("ICO-Guidelines"). Additionally, on 11 September 2019, FINMA issued a supplement to the ICO-Guidelines to discuss the legal qualification of stable coins under Swiss law. Furthermore, FINMA issued guidelines on payments on the blockchain in its guidance 02/2019 dated 26 August 2019 and it issued a fact sheet on virtual currencies on 1 January 2020 (see also question 9).

Over the years, with the development of the blockchain industry, certain shortcomings of the existing legal framework have become apparent, e.g. the civil law requirement for a written instrument to effect a valid transfer and assignment of claims (see question 16) or the general concept of anti-money laundering regulation attaching to financial intermediation activities where the technological development aims at reducing dependency on intermediaries. To address some of these concerns, certain blockchain-specific legislation is currently being prepared at the federal level (see further questions 6 to 9).

The main regulator in the Swiss financial market is the Swiss Financial Market Supervisory Authority FINMA, with certain regulatory and supervisory activities being exercised by recognised self-regulatory organisations ("SRO"). Some of the regulations issued by the SROs have been recognised by FINMA as minimum standards (e.g. in the area of money laundering prevention).

6. What is the current attitude of the government and of regulators to the use of blockchain technology in your jurisdiction?

Representatives of the Swiss federal government have publicly stated that Switzerland intends to become a leading hub for research and business solutions based on blockchain technology. Swiss parliament followed suit, adopting the proposed DLT Act unanimously. The DLT Act aims to ensure legal certainty and to foster innovation for blockchain-based projects (see also question 5). The positive attitude of the Swiss authorities is also shown by the willingness to support innovation in the crypto field. Innosuisse, the Swiss Agency for Innovation Promotion, is funding a four-year programme of the Swiss Blockchain Federation to generate ideas and start-ups in the Swiss blockchain industry. Further

initiatives exist at the cantonal (i.e. state) level: The canton of Zurich has published a guide to determine in which cases the use of blockchain technology may be beneficial for the public administration. For 2021, the canton of Jura has planned a blockchain-based solution for the certification of documents. In pursuing this, the canton hopes to strengthen the trust of citizens and businesses in the administration's online services.

Also, the Swiss Financial Market Supervisory Authority FINMA has generally taken a welcoming attitude towards fintech and blockchain, even creating a specific fintech desk to address the needs of start-up companies and other players in that space. FINMA issued new guidelines (see also question 5) and revised several of its circulars, which specify its practice under applicable regulation, to render them technology-neutral (e.g. by removing requirements for documentation to be held in physical, written form or by specifically enabling technology-based solutions such as video and online identification for client onboarding purposes).

That said, FINMA is strict in applying Swiss financial regulation to traditional businesses and fintechs alike. Innovators should not expect preferred treatment on the basis of the "newness" and expected benefits of their business models. A key focus of FINMA lies on the enforcement of Swiss anti-money laundering ("AML") regulation, in a bid to limit the risks of technology being abused for fraudulent or other undesirable purposes (see also question 2).

7. Are there any governmental or regulatory initiatives designed to facilitate or encourage the development and use of blockchain technology (for example, a regulatory sandbox)?

The DLT Act's key changes came into force on 1 August 2021. The DLT Act is a framework act that introduces amendments to several existing Federal Acts. Key proposed changes include the following:

- Amendments to Swiss civil securities legislation in the Swiss Code of Obligations ("CO") to introduce a new category of uncertificated register value rights (Registerwertrechte) that allows for the digitisation or tokenisation of assets (rights) such as shares, bonds and other financial instruments, as well as for the transfer of such instruments. The register value rights are uncertificated value rights that can serve the same functions as traditional paper securities or centrally registered book-entry securities (Bucheffekten), enabling e.g. the issuance of shares in a company as register value rights based on a decentralised electronic ledger. The new articles 973d et seq. CO provide for a non-deterministic set of rules on register value rights and their legal characteristics, outlining the principles of their establishment, transfer, pledge and cancellation. The provisions of the CO on register value rights protect the good faith of persons relying on the register entry (e.g. the debtor of a claim or the acquirer of a share in the form of a register value right, see article 973e CO) in a fashion similar to traditional securities, while simple value rights do not offer such protection. The technical details of the implementation of an eligible register and register value rights in practice are left to the private sector.
- Amendments to Swiss insolvency rules in the Federal Law on Debt Collection and Bankruptcy ("DEBA") to provide for specific segregation rights regarding crypto-based assets in the bankruptcy of a custodian as well as the segregation of (access) data. The new article 242a DEBA in particular provides a legal basis for segregation in scenarios where crypto-based assets are held in collective storage, provided it is possible to identify which part belongs to the specific claimant. These changes to the DEBA have also been reflected in amendments to the provisions of the Federal Banking Act ("BankA") on custody assets (articles 16 and 37d BankA).
- Introduction of a new stand-alone licence type under the FMIA for so-called "DLT Trading Facilities" (DLT-Handelssysteme), i.e. professionally operated venue for the multilateral trading in standardised DLT securities (noting that, however, currently, it is not possible to trade derivatives on a DLT Trading Facility). Differing from the licences for traditional trading venues such as stock exchanges and multilateral trading facilities, the DLT Trading Facility licence type is intended to be a unified licence enabling its holder to also provide certain post-trading services normally reserved to other financial market infrastructures, notably central custody/depository services as well as clearing and settlement. Another distinction vis-à-vis traditional trading venues is that the DLT Trading Facility licence type would allow for the admission of private individuals or unregulated legal entities to trading instead of regulated participants only.

The Swiss National Bank announced in late 2020 that it successfully conducted two proofs of concepts for the settlement of tokenized assets in central bank money on a distributed ledger in collaboration with the International Bank for International Settlement's Innovation Hubs and SIX Swiss Exchange (the operator of the financial market infrastructure). In particular, the first project involved the issuance of a so-called "central bank digital currency" (CBDC) for use by financial intermediaries and in the second project, a DLT platform was connected to the existing payment systems. The collaboration sets the stage for further joint experiments to assess the impact of digital innovations to the financial system.

Separately, the Swiss financial regulatory framework provides for a so-called fintech licence. (formally, fintech licence holders are referred to as "persons pursuant to article 1b BankA"). Holders of a fintech licence are allowed to accept and hold (and to solicit the acceptance and holding of) deposits from the public, on a professional basis, for amounts of up to CHF 100 million (higher ceiling amounts can be approved by FINMA in the individual case or might be introduced by the Federal Council for general application from time to time). The key limitation of the fintech licence is that holders are not allowed to engage in commercial banking business with maturity transformation. While the licence is available to all kinds of businesses that are required to hold third party funds for extended periods, it was mainly created to enable innovative business models in the financial market, whether on the basis of blockchain technology or not. Its introduction marks the completion of a three-pillar fintech programme initiated by the Swiss Federal Council in November 2016. The two previously implemented pillars referred to (i) the extension of the maximum holding period for third party funds in so-called settlement accounts (i.e. the time period during which such funds do not yet qualify as deposits) from seven days to 60 days and (ii) the establishment of a regulatory sandbox for innovative companies outside of prudential supervision. Both of these measures were put into effect on 1 August 2017.

8. Have there been any recent governmental or regulatory reviews or consultations concerning blockchain technology in your jurisdiction and, if so, what are the key takeaways from these?

At the level of the Swiss federal government, crypto currencies, their legal qualification and potential risks were first specifically addressed on 25 June 2014, on which date the Federal Council issued a report in response to two separate postulates by members of the Swiss federal parliament. This was followed up in 2018, when the Federal government conducted a more in-depth study of blockchain technology and its current and future applications, in particular in the financial sector. The results of the study were compiled in a report of the Federal Council published on 14 December 2018 under the title "Legal basis for distributed ledger technology and blockchain in Switzerland".

The report was prepared on the basis of certain principles and convictions, in particular that (i) policymakers should merely provide an framework conducive to innovation, while the preferences of the market and society in general should determine which technologies will prevail; (ii) Switzerland should not fundamentally call into question its proven and balanced legal framework, but should swiftly make targeted adjustments as needed where there are gaps or obstacles with regard to blockchain applications; (iii) Switzerland should continue to pursue a principle-based and technology-neutral legislative and regulatory approach, but should allow exceptions if necessary; (iv) Switzerland should position itself as an attractive location for blockchain businesses, but not tolerate any use of innovative technologies for fraud or circumvention of the regulatory framework; (v) Swiss authorities should position themselves as open towards new technologies and innovations and engage in an ongoing dialogue with the industry.

In the report, the Federal Council identified a need for specific amendments to certain federal laws in order to enhance legal certainty and remove hurdles for practical applications of blockchain technology in the financial sector on the one hand, and, on the other hand, limit the risks of technology being abused for fraudulent or other undesirable purposes. These findings formed the basis for the DLT Act (see question 7).

9. Has any official guidance concerning the use of blockchain technology been published in your jurisdiction?

In recent years, FINMA issued several pieces of guidance regarding the use of blockchain in financial services. These set out FINMA's interpretation of the law when reviewing business models relating to digital assets or otherwise making use of blockchain technology. Such sources further provide guidelines to interested parties wishing to submit their project for review by FINMA prior to launch, often with the goal of being provided with a so-called "no-action letter" or to ascertain applicable licence requirements.

In particular, relevant guidance issued by FINMA includes

the FINMA guidance 04/2017 on the regulatory treatment of initial coin offerings (ICOs) dated 29 September 2017, the FINMA guidelines for enquiries regarding the regulatory framework for ICOs dated 16 February 2018, an update and supplement to said guidelines focusing on issuances of "stable coins" dated 11 September 2019 as well the FINMA guidance 02/2019 regarding payments on the blockchain dated 26 August 2019. Furthermore, FINMA noted in a fact sheet on virtual currencies on 1 January 2020 that financial market laws, e.g. mainly Swiss banking and anti-money laundering laws, may apply to blockchain-based projects and that FINMA will launch investigations if it receives specific information that a project is being carried out without a required authorisation.

The various guidance papers published by FINMA generally emphasise the technology-neutral and principle-based nature of Swiss financial regulation. This provides leeway for the realisation of innovative business models but requires that projects are reviewed and evaluated on a case-by-case basis, often in a dialogue with the regulator. As far as projects relate to the issuance, trading, custody or other activities relating to blockchain tokens, FINMA has provided a general classification into three categories – taking a substance-over-form approach – to enable a structured analysis of the relevant business model under applicable financial regulation. Specifically, FINMA distinguishes between payment tokens (crypto currencies), utility tokens and asset tokens, acknowledging that hybrid forms and transformations from one category into another along the timeline of a blockchain-based project are possible.

In addition to direct guidance, the FINMA annual report as well as the FINMA enforcement report (also published annually) are sources of indirect guidance in that the provide an overview of FINMA's activities in the area of blockchain financial services and in particular summaries of enforcement proceedings. Likewise, the reports issued by the Swiss federal government on crypto currencies and the use of blockchain technology in the financial sector provide guidance on the interpretation and development of the Swiss legal framework in this regard (see question 8).

10. What is the current approach in your jurisdiction to the treatment of cryptocurrencies for the purposes of financial regulation, anti-money laundering and taxation? In particular, are cryptocurrencies characterised as a currency?

Financial regulation

Swiss law does not specifically define the term "cryptocurrency", a consequence of the principle-based and technology-neutral approach to financial regulation. Some federal ordinances, in specifying certain legal requirements, refer to "virtual currencies" (Anti-Money Laundering Ordinance) or "assets based on electronic encryption" (Federal Banking Ordinance). For the purposes of the fintech license, "crypto-based assets" are assets held in collective custody and which factually, or according to the intention of the organizer or issuer, serve to a significant extent as a means of payment for the acquisition of goods or services or the transfer of money or value. Further, according to the Federal Council's dispatch on the DLT Act of 27 November 2019, the term "crypto-based assets", for the purpose of the DEBA, refers to all assets for which the power of disposal is granted exclusively via a crypto-based access procedure. Amongst others, payment tokens (see below) as well as uncertificated register value rights introduced by the DLT Act are covered by the term (p. 292).

While there is no comprehensive definition of cryptocurrencies in Swiss law, there is interpretative guidance by federal authorities. In particular, the Swiss federal government outlined an initial understanding of the legal qualification of virtual currencies in a report dating back to 2014, which was mainly based on an analysis of Bitcoin (Federal Council report of 25 June 2014 on virtual currencies in response to the Schwaab (13.3687) and Weibel (13.4070) postulates, p. 7; see also question 7): "A virtual currency is a digital representation of a value which can be traded on the Internet and although it takes on the role of money – it can be used as means of payment for real goods and services – it is not accepted as legal tender anywhere. […] Virtual currencies exist only as a digital code and therefore do not have a physical counterpart for example in the form of coins or notes. Given their tradability, virtual currencies should be classified as an asset."

More recently, FINMA issued further guidance on the regulatory treatment of blockchain tokens and activities relating thereto (see question 8). Pure crypto currencies that are not coupled with any claim against an issuer (such as Bitcoin) are classified by FINMA under its "three bucket" approach as so-called payment tokens, i.e. tokens that are factually used or intended by the issuer to be used as a means of payment for goods or services or as a means for the transfer of money or value (cf. FINMA guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs) dated 16 February 2018, p. 3).

Within this classification, FINMA considers that payment tokens typically do not qualify as securities in the meaning of Swiss law, but may be considered a means of payment under Swiss anti-money laundering (AML) regulation if they can be transferred by technical means on a blockchain infrastructure. If that is the case, the token issuer (assuming the tokens are issued against consideration) qualifies as a so-called financial intermediary and must (i) join a recognised Swiss SRO for AML purposes, and (ii) comply with Swiss know-your-customer requirements in connection with the token issuance as well as further duties based on AML regulation such as proper record-keeping and reporting duties in case there is a suspicion of money laundering or terrorist financing (compliance with these requirements can be substituted by way of the issuer mandating a regulated Swiss financial intermediary with the collection of funds and performing the associated duties). Similarly, once a cryptocurrency qualifying as a payment token is in circulation, service providers such as custodians or exchange platforms may also be required to comply with Swiss AML regulation if they are acting in or out of Switzerland.

Other forms of tokens that are not pure crypto currencies (incl. so-called “stable tokens” that are linked to underlying assets such as fiat currency, commodities or securities) may be subject to substantially different treatment. In particular, these may be digital assets qualifying as securities or other financial instruments, interests in a collective investment scheme or (bank) deposits. The legal qualification of these types of tokens and activities relating thereto must be assessed in the individual case based on the available FINMA guidance. In many cases with a Swiss nexus, it is considered good practice to pre-discuss projects relating to blockchain tokens with FINMA and/or to obtain a ruling regarding the applicable regulatory treatment (sometimes referred to as “no-action letter”) prior to implementation.

It is furthermore possible that security tokens qualify as financial instruments under the Federal Act on Financial Services (“FinSA”). As a result, issuers of such tokens may, in principle, be required to publish a prospectus and a key information document if no exemption applies (see also question 13). Beyond this, the FinSA specific rules such as client segmentation, rules of conduct or organisational rules can apply to persons engaging in the acquisition or disposal of such tokens or other financial services relating to such tokens, on a professional basis.

Taxation

With regard to the Swiss tax treatment of crypto currencies, the following guidelines have been published during the year 2019: (i) a revision of various value-added tax (VAT) guidelines and sector information guidelines, outlining the relevant aspects of Swiss VAT treatment (published on 17 June 2019), and (ii) a working paper on the tax treatment of crypto currencies as well as initial coin/token offerings in the area of wealth tax, income/profit tax, withholding tax and stamp duty (published on 27 August 2019). Also, the Swiss Federal Tax Authority (FTA) has included the most popular crypto currencies in the foreign currency exchange list it publishes for the purposes of enabling conversion into Swiss Francs for tax purposes. In addition, certain cantons have published their own guidance on the tax treatment of crypto currencies, especially with regard to wealth tax/individual tax.

For tax purposes, tokens are generally categorised into the following buckets: (i) payment (or native) tokens, (ii) asset-backed tokens (further divided into debt tokens, equity tokens and participation tokens), and (iii) utility tokens.

Payment tokens are from a tax perspective treated as movable capital assets. Therefore, they are subject to wealth tax at the cantonal/communal level on the basis of their fair market value (i.e. typically the year-end value published in the FTA foreign currency exchange list) if held by a Swiss individual investor at year-end. The purchase or sale of payment tokens is treated like a transaction with traditional means of payment (currencies). The resulting profit or loss at the level of a Swiss individual investor generally qualifies as taxable income or as a non-tax-deductible expense (with certain exceptions, e.g. salary payments in payment tokens, professional trading in payment tokens, income from mining activities etc.). The purchase of a payment token by a Swiss investor on a crypto exchange respectively the issuance of a payment token is not subject to Swiss withholding tax. Because payment tokens do not qualify as taxable securities, they are not subject to issuance stamp duty respectively security transfer tax. From a VAT perspective, the issuance of payment tokens is not considered a taxable supply/service. The use of a payment token for the purchase of a supply or service is treated like the use of traditional means of payment (currencies), i.e. as a remuneration, and is not itself considered a taxable supply or service.

The categorisation into asset-backed tokens and utility tokens is more complex and the relevant tax treatment depends on the specific facts and circumstances respectively “features” of the token.

11. Are there any prohibitions on the use

or trading of cryptocurrencies in your jurisdiction?

Switzerland does not prohibit the use or trading of crypto currencies nor are there any specific exchange controls relating to crypto currencies. However, certain activities relating to crypto currencies or other digital assets (e.g. custody, brokerage services or the operation of a DLT trading facility, trading or exchange platforms) may be subject to regulation, licence or registration requirements and/or supervision by the Swiss Financial Supervisory Authority FINMA, other authorities or supervisory or SROs in Switzerland if the business is operated in or out of Switzerland or otherwise has a relevant Swiss nexus.

In its guidance 02/2019 regarding payments on the blockchain dated 26 August 2019, FINMA informed market participants about its interpretation of Swiss anti-money laundering regulation in the context of blockchain payment services. Specifically, the guidance addresses how the Swiss law requirement for financial services providers under FINMA supervision to transfer payment originator and beneficiary information to the recipient institutions in payment transactions must be interpreted in the context of crypto currencies, with FINMA applying a rather restrictive approach. While FINMA holds that originator and beneficiary identification data must not necessarily be transmitted using blockchain technology, it further stated in the guidance that it is currently neither aware of any system at national or international level (such as the SWIFT messaging system) nor of any bilateral agreements between individual service providers that would enable the reliable transmission of such data for the purposes of payment transactions on blockchain.

As a consequence, for the time being, financial institutions subject to FINMA supervision are required to ensure that transfers of tokens to or from external wallets (including in the context of exchange transactions) only involve their own clients who have been appropriately onboarded. “Ownership” of external wallets must be verified using “suitable technical means”, which may prove challenging in practice. Where a token transfer involves the external wallet of a non-client third party, the financial institution will need to complete a full onboarding of such person as if it were a new client. While the guidance applies only to service providers subject to FINMA supervision, also recognised Swiss SROs have followed suit with respect to their interpretation of analogous provisions in their anti-money laundering regulations as applicable to their member financial intermediaries.

FINMA has acknowledged that the requirements outlined above (commonly referred to as the travel rule) are very strict and go beyond the standards stipulated by the Financial Action Task Force (FATF) in its guidance on virtual asset transfers. However, this approach is a reflection of the increased Swiss focus on the prevention of money laundering and terrorist financing and FINMA’s intent to preclude any circumvention of the existing regulatory framework using blockchain technology.

12. To what extent have initial coin offerings taken place in your jurisdiction and what has been the attitude of relevant authorities to ICOs?

ICO activity in Switzerland rose significantly from 2016, peaking in 2018 with a total of 86 completed ICOs in the first 10 months of the year, representing an investment volume of approx. USD 1,65 billion (ZHAW Zurich University of Applied Sciences, *Initial Coin Offerings – Survey 2018*, p. 9). In 2019 and 2020, however, the funding volume of token offerings dropped significantly (Institute of Financial Services Zug (IFZ), IFZ Fintech Study 2021).

FINMA continues to take an open-minded approach towards projects for token issuances in or out of Switzerland to the extent they are structured and conducted in line with Swiss and applicable foreign financial regulation. Organisers are encouraged to pre-discuss their projects with the regulator prior to launch and to obtain formal feedback in the form of a regulatory no-action letter or confirmation of the regulatory requirements to be complied with.

13. If they are permissible in your jurisdiction, what are the key requirements that an entity would need to comply with when launching an ICO?

There is no cookie-cutter approach to Swiss ICOs or STOs. In short, any such project must be reviewed individually, taking a substance-over-form approach, to determine applicable legal and regulatory requirements. Depending on the nature and categorisation of the token to be issued, differing regimes may apply.

For instance, issuances of pure payment tokens in or out of Switzerland are typically subject to anti-money laundering regulation. Where tokens qualify as securities under Swiss law – which may e.g. be the case for asset token or for hybrid forms such as some of the types of stable coins outlined below, current Swiss law requires that a prospectus be prepared in specific cases only, namely for tokens constituting or representing shares,

bonds, units of collective investment schemes or structured products offered to retail investors (noting that there are several exemptions available from the requirement to prepare a prospectus). Utility tokens, i.e. tokens intended to provide access to a digital application or service which is rendered using a blockchain may in principle fall outside of current financial and securities regulation. However, in practice, they often include other components that lead to a different regulatory qualification, i.e. this category is narrowly framed. Furthermore, according to FINMA practice, if a utility token is not useable as such at the point in time of issuance, it must be considered a security. Furthermore, for certain tokens qualifying as financial instruments and that are intended to be offered to retail clients, a key information document will need to be prepared.

If a payment token is structured as a "stable coin" with a link to certain underlying assets, further requirements may apply, as detailed in recent FINMA guidance (see also question 9):

Where a stable coin is backed by **currencies** and the holder of the coin has a right of redemption at a fixed price against the issuer, the latter may be deemed to have accepted deposits from the public, an activity requiring a license as a bank pursuant to the Swiss Banking Act. By contrast, if the coinholder may redeem only at the current value of an underlying currency basket (i.e. at net asset value), the coin may qualify as a unit in a collective investment scheme rather than as a deposit, triggering licensing and approval requirements pursuant to the Swiss Collective Investment Schemes Act (CISA).

Licensing requirements for an issuer of stable coins backed by **commodities** depend on the type of underlying commodity and whether the coin holder has a contractual claim only or acquires a right in rem in the underlying commodity. Stable coins representing a right in rem are not subject to financial market regulations and do not qualify as securities if certain requirements are fulfilled at all times. By contrast, where a stable coin represents a contractual claim against the issuer, the qualification of the coin depends on the type of the underlying commodity. If the stable coin is backed by banking-grade precious metals, the issuer may require a banking license. If other commodities are used as underlying, the coin may constitute a security and potentially also qualify as a derivative resulting in a potential licensing obligation for the issuer as a securities dealer. Lastly, commodity-based stable coins may also qualify as units in a collective investment scheme if the investors are exposed to the risks related to the management and custody of the underlying commodities. The same will in most cases go for redeemable stable coins backed by **real estate**.

Where stable coins are backed by **securities**, a distinction must be made between a single-security underlying and a basket of securities. Coins backed by a single security are likely, by extension, to also qualify as a security and may, depending on the specifics of the individual case, constitute a derivative or even a structured product. By contrast, if the underlying is composed of a basket of several securities, the stable coin so backed will in most cases constitute a unit in a collective investment scheme.

14. Is cryptocurrency trading common in your jurisdiction? And what is the attitude of mainstream financial institutions to cryptocurrency trading in your jurisdiction?

Trading in crypto currencies can at this point be considered a fairly common activity in Switzerland. Both individuals and an increasing number financial institutions engage in crypto trading. There are a number of professional Swiss financial intermediaries that offer exchange or trading as well as related wallet services relating to crypto currencies that do not qualify as securities under Swiss law.

Some Swiss banks and securities firms have taken up services for their clients relating to crypto currencies. That said, many still have a reserved attitude towards clients with major crypto currency holdings or those that are active in crypto currency or blockchain related businesses. In 2018, with the goal of alleviating certain concerns and supporting member banks in their approach towards new types of clients, the Swiss Bankers Association (SBA) published guidelines on the opening of company accounts for blockchain companies. In August 2019, the guidelines were updated with new terminology and content. The SBA guidelines specifically address client due diligence aspects, expectations with respect to token issuers as clients and explanations regarding specific business models.

15. Are there any relevant regulatory restrictions or initiatives concerning tokens and virtual assets other than cryptocurrencies (e.g. trading of tangible property represented by cryptographic tokens)?

Please refer to questions 7 to 10 and 13 regarding the general classification of tokens and regulatory approach, incl. as far as tokens qualifying as securities are concerned.

With respect to representing tangible property in a blockchain token, it is worth noting that the Federal Council, in its DLT report dated 14 December 2018, takes the general position that tokens cannot represent rights in rem in a legally effective way in lieu of possession. However, where rights in rem are exercised through indirect possession combined with a contractual agreement between the party with direct possession and the owner, a representation of such rights in a blockchain token or other decentralised register entry is considered legally feasible by the Federal Council.

Furthermore, the DLT Act enables a more standardised approach to security token offerings in Switzerland and create further incentives for the creation of corresponding trading and exchange infrastructures.

16. Are there any legal or regulatory issues concerning the transfer of title to or the granting of security over tokens and virtual assets?

Where digital assets are intended to represent a claim against an issuer or another external party, there was a major concern under Swiss law that the formal requirements for the transfer of such claim from one party to another cannot be fulfilled by a mere digital transaction on a distributed ledger. This is because Swiss law generally requires a written instrument for an effective transfer of uncertificated claims. Similar concerns apply with regard to the granting of security over claims represented by blockchain tokens.

The DLT Act that entered into force in 2021 partially resolved the legal uncertainty by creating a civil law foundation in the Swiss Code of Obligations for securities existing on the basis of a decentralised digital ledger only (so-called uncertificated register value rights). Furthermore, the new law includes specific rules regarding the transfer of such uncertificated register value rights as well as the creation of pledges over such securities. It is worth noting that pure crypto currencies, i.e. native units of value on a blockchain that do not constitute nor represent a claim against a third party, are mostly unaffected by the concerns set out above.

17. How are smart contracts characterised within your legal framework? Are there any enforceability issues specific to the operation of smart contracts which do not arise in the case of traditional legal contracts?

In its report on the legal framework for distributed ledger technology and blockchain in Switzerland of 14 December 2018 (pp. 80 et seq.), the Federal Council characterised smart contracts as a computer protocol, usually based on a decentralised blockchain system, which allows automated contract execution between two or more parties with previously coded data. According to the Federal Council, a smart contract has three main characteristics:

1. No human intervention is required: The terms of the contract are first determined by the parties and then converted into machine-readable form so that it can be executed automatically.
2. A smart contract is immutable, i.e. the code cannot be changed by any party. It is thus, in principle, the absolute embodiment of the principle pacta sunt servanda.
3. The smart contract is limited to the digital world. Typically, only electronic goods or services (exchange of digital goods, transfer of money etc.) can be the subject of a smart contract.

The term “smart contract” is somewhat of a misnomer, as it denotes technology for contract execution rather than a contract in the sense of the Swiss Code of Obligations. That said, what can be agreed within the framework of party autonomy under general principles of Swiss law should also be permissible within the framework of a smart contract. However, Swiss legal doctrine and practice in this area are still in a very early phase of development and potential issues such as liability for programming errors or execution errors have not yet been fully explored. We are further not aware of any relevant Swiss case law in the area of smart contracts. Certainly, the immutability of smart contracts raises questions as to how changing circumstances and dispute resolution can be adequately addressed (cf. Federal Council report “Legal basis for distributed ledger technology and blockchain in Switzerland” dated 14 December 2018, p. 81).

18. To what extent are smart contracts in use in your jurisdiction? Please mention any key initiatives concerning the use of smart contracts in your jurisdiction, including any examples relating to decentralised finance protocols.

Smart contracts are used in various expressions for the purposes of token issuances making use of a public blockchain such as the Ethereum blockchain (typically using the ERC-20 or ERC-271 technical standard). Furthermore, the potential of smart contracts is often

discussed in the area of financial intermediation activities as well as insurance products and the cooperation between insurers and reinsurers. B3i is a notable Swiss based industry initiative aiming to apply blockchain technology to the insurance sector. Swisscom (a major Swiss telecommunications provider) announced that it joined the Chainlink network that provides necessary data for decentralised finance applications.

With regard to public initiatives, in particular the pilot projects of the commercial registries of the Cantons of Zug and Geneva are of note (see question 1).

19. Have there been any governmental or regulatory enforcement actions concerning blockchain in your jurisdiction?

We are not aware of any relevant enforcement actions. However, FINMA wrote in its 2020 Annual Report that it had noticed a certain decrease in the number of ICOs and also a decrease in the number of indicia of FinTech service providers who might be operating without a necessary authorisation or registration. According to FINMA, this trend might be explained by the fact that players active in the FinTech sector are now more familiar with the legal parameters for their activities.

In July 2018, FINMA launched an enforcement proceeding against envion AG, an ICO issuer that had allegedly aimed to develop mobile mining units for crypto currencies. The proceeding was concluded in March 2019. In a press release dated 27 March 2019, FINMA announced that the company had accepted deposits (in the meaning of Swiss banking regulation) from at least 37,000 investors without a relevant financial market licence and had thereby severely violated supervisory law. The deposits amounted to over CHF 90 million Swiss francs. No supervisory measures by FINMA were considered necessary as the Cantonal Court of Zug had in the meantime opened bankruptcy proceedings over the company on grounds of organisational deficiencies (see also question 2).

In 2017, FINMA conducted enforcement proceedings against an association and two companies that had developed and marketed a “fake” cryptocurrency under the name “E-Coin”. They were found to have operated a commercial deposit-taking business without a relevant financial market licence (as later confirmed by the Swiss Federal Administrative Court). As a consequence, FINMA ordered them to be liquidated (see also question 2).

20. Has there been any judicial consideration of blockchain concepts or smart contracting in your jurisdiction?

We are not aware of any relevant Swiss case law at the federal level with respect to the concepts discussed herein.

21. Are there any other generally-applicable laws or regulations that may present issues for the use of blockchain technology (such as privacy and data protection law or insolvency law)?

Swiss data protection law is set forth in the Federal Act on Data Protection (DPA) and its implementing ordinance. As a general concept, blockchain business can become subject to the DPA if they are domiciled in Switzerland process personal data in Switzerland (the mere storage of personal data on a server in Switzerland is sufficient). Deviating from most foreign data protection laws, the DPA also treats information referring to legal entities as personal data. The DPA is under revision and it is expected to enter into force mid-2022 to early 2023. The revised DPA will no longer protect personal data of legal entities, but will provide more obligations – similar to the EU law – and higher fines for certain violations of the DPA.

The Swiss parliament passed the DLT Act that came into form in early 2021. Based on this, amongst others, new rules with regards to the segregation of crypto-based assets from the bankruptcy estate, both in general insolvency and bank insolvency, as well as on access to data have been introduced to the DEBA (see also question 5).Are there any other key issues concerning blockchain technology in your jurisdiction that legal practitioners should be aware of?

To ensure legal and regulatory compliance, the legal qualification of commercial applications of blockchain technology, tokens and activities relating thereto must be assessed in the individual case prior to implementation (e.g. by obtaining a “no action” letter from FINMA (see question 9) or a tax ruling from the tax competent authorities). This has to be considered in the project management from the very beginning.

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