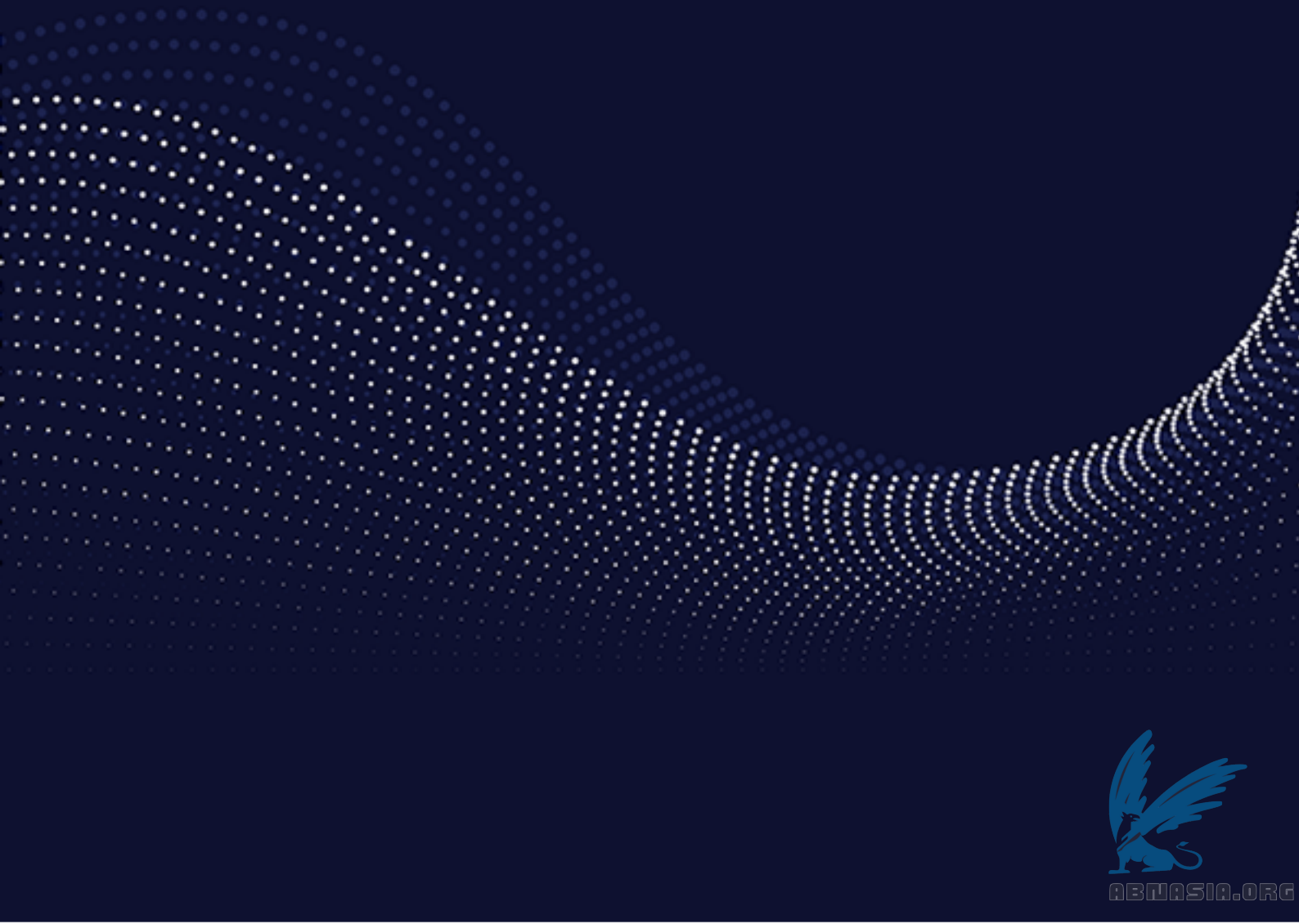
LEXOLOGY
Getting The Deal Through

CRYPTOASSETS & BLOCKCHAIN

Switzerland



Cryptoassets & Blockchain

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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?

At present, no crypto-specific regulation exists in Switzerland. Existing principle-based and technology-neutral law applies to cryptoassets. The Swiss Financial Market Supervisory Authority (FINMA) categorises cryptoassets based on the underlying economic function and applies existing financial market regulations to the cryptoasset itself, its issuance and transfer.

From a regulatory point of view, FINMA differentiates between three distinct types of cryptoassets and refers to these assets as tokens (ie, asset (security) token, payment token and utility token as well as hybrids thereof).

Depending on the nature of a cryptoasset, different laws must be observed, namely:

- the Banking Act (BA);
- the Financial Market Infrastructure Act (FMIA);
- the Collective Investment Schemes Act;
- the Insurance Supervision Act;
- the Anti-Money Laundering Act (AMLA);
- the Financial Services Act; and
- the Financial Institutions Act.

In particular, non-fungible tokens (NFTs), protocol tokens or stablecoins must also be assessed under the above-mentioned regulations, even if in some cases the typical three token categories of FINMA do not really fit such token types.

NFTs are cryptoassets that are unique and not fungible with other cryptoassets, including digital art and collectables. While unique and non-fungible cryptoassets might be traded on the marketplace and be accumulated speculatively, they are not readily interchangeable and the relative value of one such cryptoasset in relation to another, each being unique, cannot be ascertained by means of comparison to an existing market or equivalent asset.

However, NFTs must be assessed for potential circumventions in particular of being a security token; the fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible. The issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility. The mere attribution of a unique identifier to a crypto-asset is not, in and of itself, sufficient to classify it as unique and non-fungible. The assets or rights represented should also be unique and non-fungible in order for the crypto-asset to be considered unique and non-fungible.

From a civil law standpoint, two types of tokens can be distinguished:

- tokens that primarily represent a value within the blockchain context (eg, cryptocurrencies such as bitcoins). According to the prevailing view, these 'payment tokens' represent purely factual, intangible assets; and

- tokens that represent a legal position (ie, claim and membership), fulfilling a similar function as securities do (also referred to as 'I-owe-you tokens').

By passing the DLT Bill on 25 September 2020, the Swiss parliament passed a law amending the current laws to include cryptoassets and digital ledger technologies (DLT) into Swiss Law, making the Swiss crypto regulatory framework one of the most advanced in the world. On 1 February 2021, the Swiss Code of Obligations (CO) entered into force; ledger-based securities are treated as a new form of securities in addition to uncertificated rights, certificated securities (or paper-based securities) and book-entry securities (or intermediated securities) if they are created and transferred on a register, such as DLT (no further transfer requirements).

The following main changes entered into force on 1 August 2021:

- According to the Federal Law on Debt Collection and Bankruptcy, the segregation of crypto-based assets in the event of insolvency is to be expressly regulated insofar as it is not necessary on a technical level anymore but only based on records.
- On the other side, the eased segregation requirements require such pooled wallet providers with off-balance sheet cryptoassets to apply for a fintech licence, even if the cryptoassets' value exceeds the 100 million Swiss franc limit.
- In the FMIA, a new authorisation category for 'DLT trading facilities' was introduced. It functions similarly to the existing multilateral trading facilities (MTF) but allows for direct access of retail participants and further services on the trading value chain within the same legal entity, such as clearing, settlement and custody services.

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, particularly 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, with its principle-based laws and regulations and being technology neutral, is very flexible towards new technologies and business models. Further, the federal and cantonal legislative and governmental bodies are willing to accommodate these innovative approaches.

Regulatory authorities

Which government authorities regulate cryptoassets and businesses transacting with cryptoassets?

FINMA, as the regulator for Switzerland, is also competent for the market supervision of cryptoassets. For anti-money laundering-only supervision, financial intermediaries must join

and be under the supervision of a private self-regulatory organisation that is recognised and supervised by FINMA. Further, portfolio managers are authorised by FINMA but supervised by a private supervisory organisation that is authorised by FINMA.

On 16 February 2018, FINMA published the ICO Guidelines, which qualifies the different types of cryptoassets into three categories and which 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:

- an obligation to restore compliance with the law;
- the issuing of a declaratory ruling;
- prohibition from practising a profession;
- the publication of the supervisory ruling;
- the confiscation of an unlawful profit;
- the appointment of investigating agents;
- licence revocation or approval; and
- the liquidation of a company.

Usually, acting without a licence in an activity actually requiring a licence (illegal activity) is also a criminal act that will be prosecuted by the criminal prosecution authorities.

Not publishing or publishing an incomplete, misleading or false prospectus for a public security token offering is not prosecuted by FINMA but is subject to criminal law and triggers civil liability of the offeror towards the investors.

Court jurisdiction

Which courts have jurisdiction over disputes involving cryptoassets?

There is no specialised court with jurisdiction over cryptoassets. Depending on the infringed law, the existing civil, criminal or administrative courts may have jurisdiction on a federal or cantonal level, or both.

In purely civil matters, parties may also agree on arbitration, subject to any mandatory jurisdiction requirements.

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?

Cryptocurrencies do not qualify as legal tender in Switzerland. However, there are no restrictions regarding legal ownership, transactions and exchange of cryptocurrency. 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 official 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 (SBF), Crypto Valley Association (CVA) and the Capital Markets and Technology Association (CMTA) lead 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 Financial Market Supervisory Authority (FINMA), the applicable regulation depends on the types of cryptoassets. In its ICO Guidelines, FINMA differentiates between:

- payment tokens: synonymous with cryptocurrencies, these are tokens 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, value storage or transfer. Cryptocurrencies give rise to no claims on their issuer. Payment tokens do not qualify as securities. However, collecting or transferring these cryptocurrencies or even the support in transferring cryptocurrencies in a permanent business relationship will usually be subject to the Anti-Money Laundering Act (the AMLA);
- utility tokens: intended to provide access (digitally) to applications or services through a blockchain-based infrastructure. If a utility token functions solely or partially as an investment in economic terms, FINMA will treat them as securities (ie, in the same way as asset tokens); and
- asset tokens: represent assets such as a debt or equity claim against or in 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, these tokens are treated analogously to equities, bonds or derivatives (securities). Generally, tokens

that enable physical assets to be traded on the blockchain also fall into this category. FINMA regards asset tokens as securities, meaning that there are securities law requirements (the Financial Services Act (FinSA), the Financial Market Infrastructure Act and FinIA) for offering or trading in them, and civil law requirements under the Swiss Code of Obligations.

The individual token classifications are not mutually exclusive (eg, both asset and utility tokens can be classified as payment tokens (hybrid tokens)).

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

In particular, the Banking Act (BA) introduced the term cryptoasset and defines in which cases a fintech licence or even a banking licence is required. Accordingly, cryptoassets are crypto-based assets that are collectively pooled and are no longer individually assignable to an individual client. These cryptoassets must intend to serve as a means of payment for the purchase of goods or services or the transfer of money or value.

Cryptoassets are not considered crypto-based assets in the sense of the BA if they are booked as credit balances on the customer accounts of securities or precious metal dealers, asset managers, a DLT trading facility or similar companies and serve solely to process customer transactions, if:

- no interest is paid for it; and
- in the case of accounts other than those of securities dealers, settlement shall take place within 60 days.

Investor classification

How are investors in cryptoassets classified and treated differently?

According to FinSA, there are three main types of investors connected with financial services:

- institutional clients, such as banks and securities houses;
- professional clients, such as financial professionals; and
- retail clients, who essentially fall outside the previous two categories and are considered consumers.

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

The Collective Investment Schemes Act (CISA) differentiates between qualified and non-qualified investors, whereby the definition of qualified investors references back to the professional client according to FinSA but adds clients with a permanent investment management or investment advisory relationship with a prudentially supervised and licensed financial institution.

Initial coin offerings

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

There is no uniform law governing ICOs in Switzerland. Depending on the qualification of the cryptoasset, different provisions may apply. There is no FINMA authorisation requirement for conducting an ICO, unless a cryptoasset is deemed as being derivative or if there is a repayment obligation of the issuer. In these cases, 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 operational on a blockchain.

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

An ICO of an asset token may, according to FinSA, lead to the obligatory publication of a prospectus or information sheet.

Issuing NFTs is generally not subject to financial market regulations provided that it does not circumvent regulations. A circumvention would, for example, be if each of 100 NFTs represents generically 1/100 of a painting because in such case each NFT would be the exactly the same except for its unique number and, therefore, have the same value and be exchangeable. This would, under Swiss law, trigger securities regulations. Opposed to this, an NFT referencing a specific piece of the 100 pieces of the painting (eg, piece B3 or H5) would be unique not only regarding its number but also its content and, therefore, would not be exchangeable with another NFT.

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

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

Offering cryptoassets qualifying as securities only leads to an authorisation requirement if the cryptoassets in question are derivatives, collective investment schemes or if an intermediary places the securities on behalf of the issuer in the primary market (securities-house licence). Further, there are strict regulatory requirements for issuing and offering structured products to private clients and retail clients respectively.

Regarding a public offering, issuers of securities must, according to FinSA, 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 who invest more than 100,000 Swiss francs;
- offerings of securities with a minimum denomination of 100,000 Swiss francs; and
- offerings that are limited to a total amount of 8 million Swiss francs.

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?

For stablecoins, FINMA follows the rules based on the stablecoin supplement to the ICO Guidelines, which takes the same approach as blockchain-based tokens by mainly focussing on the economic function and the purpose of a token (substance over form). Depending on the case, FINMA will follow the 'same risks, same rules' principle and the relevant features of each case.

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

Airdrops

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

Generally, no, but in certain cases, anti-money laundering provisions may apply. If the airdrop is done without the required activity from the receiving party (in particular no purchase price and no other consideration including (personal) data), the receiving party has not made an investment decision; 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, triggering the FinSA prospectus and basic information sheet requirements with the issuer and FInSA duties of conduct 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 the basic information sheet for the respective financial instrument. Advertising for accepting cryptocurrencies as public deposits according to the Banking Act to Swiss residents is only allowed with a banking licence.

In all other cases, there are no strict provisions regarding advertising. However, laws regarding unfair competition and criminal statutes 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, no, except, for example, potential transfer restrictions imposed by the issuer based on securities laws or derivatives trading obligations. Further, Swiss or other sanctions regulations may prohibit transfers in crypto assets.

Crowdfunding

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

According to Swiss regulations, four crowdfunding categories must be differentiated that apply regardless of involving fiat or crypto:

- crowd donating;
- supporting;
- lending; and
- investing.

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

Crowdlending may lead to the requirement of a banking licence according to the BA. However, depending on the amount of funds raised, certain exemptions and reliefs may apply. In particular, the fintech licence is available for innovative projects not collecting more than 100 million Swiss francs from the public or unlimited pooled crypto-based assets and neither investing those funds nor paying interest. This licence provides for many reliefs regarding capital and organisational requirements. Depending on the structure, crowd investing may trigger collective investment-scheme regulations.

Transfer agents and share registrars

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

No specific laws govern these services. Generally, the AMLA must be observed for transferring any kind of cryptoasset qualifying as a financial instrument or means of payment and even for supporting the transfer of cryptocurrencies in a permanent business relationship. In particular, changing cryptocurrency into another cryptocurrency or fiat currency is considered to be money exchange or remittance; therefore, it is subject to the AMLA. Also, the provision of cryptoasset transfer services will trigger anti-money laundering obligations if the service provider conveys over or safekeeps 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 those laws.

Generally, only an ICO regarding payment token or a hybrid token with payment functions is subject to the AMLA. However, AML and KYC requirements are often triggered if a financial intermediary is involved in a transaction with payment tokens.

Natural or legal persons offering services regarding cryptoassets within the scope of the AMLA must join a self-regulatory organisation. Those private self-regulatory organisations recognised by the 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;
- the verification of beneficial ownership;
- politically exposed persons and sanctions checks;
- the sourcing of funds and wealth;
- enhanced due diligence in the case of high risks or red flags within the client relationship. In the context of 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
- the freezing of assets.

Further, the Travel Rule applies to transactions in cryptocurrencies similarly to wire transfers in fiat currencies.

The extent of the aforementioned obligation may vary depending on the services or activities and the number of Swiss francs collected or transferred.

Presently, there are no specific rules, guidelines or established practices regarding cryptoasset providence identification or proof of ownership. However, these checks must be performed 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?

Sanctions are implemented in Switzerland by the Embargo Act (EmbA) and the corresponding ordinances regarding specific sanctions towards certain countries, people or organisations to restrict the provision of certain services and sale of goods financing those persons. International UN sanctions are directly applicable in Switzerland and must be regularly observed, particularly when providing financial services. Further, Switzerland usually implements EU sanctions. However, the Swiss government is not allowed to impose its own sanctions or stricter sanctions than the EU. Business relationships with sanctioned persons may not be commenced or must be terminated.

In Switzerland, sanctions regulations are completely separate from AML regulations. The main competent authority for sanctions regulations implementation and supervision is the Swiss State Secretariat for Economic Affairs (SECO).

The UN and the FATF anti-terrorism financing principles are implemented by EmbA sanction's legislation and the AMLA, particularly the enhanced due diligence and notification duties.

In particular, the Travel Rule is implemented as part of the AML framework by article 10 of the AML Ordinance FINMA (AMLO-FINMA) and the regulations of self-regulatory organisations (SROs). Finally, there is no specific Swiss regulation for virtual asset service providers (VASPs) according to the FATF, but the VASP-requirements are mainly implemented by the AMLA and also by the licence requirements of other financial market laws, such as the BA or FinIA.

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 a 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.

In the case of money exchange transactions, for example, the contracting party must be identified if there is a minimum of 5,000 Swiss francs (comprised of 1,000 Swiss francs respectively in transactions with virtual currencies) and its beneficial owner must be identified if there is a minimum of 15,000 Swiss francs. The changer must take appropriate measures to ensure that the wallet is that of the customer (a two-party transaction) and not that of a third party; otherwise, it would be a money remittance activity and the identification obligation would apply to zero Swiss francs for outbound transactions and 1,000 Swiss francs for inbound transactions. An intensified duty to monitor transactions with virtual assets exists, whereby the changer must implement suitable technical precautions to prevent any transactions from exceeding the threshold of 1,000 Swiss francs within a period of 30 days.

Concerning transactions of payment tokens, financial intermediaries must apply the Travel Rule based on the Financial Market Supervisory Authority (FINMA) Anti-Money Laundering Ordinance (AMLO-FINMA) 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 on one's own account (if certain turnover thresholds are exceeded), generally requires a securities-house licence. The licensing requirements also apply to the entity's public issuing of derivatives or the 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 exchange dealers may not accept public deposits unless they have a banking licence. The same applies to cryptoasset dealers, who convey over or safekeep the private keys of their clients. However, depending on the number 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 or 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 the 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 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 that acquire or dispose of asset tokens in secondary trading on behalf of clients qualify as financial service providers according to the Financial Services Act (FinSA) and 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, including 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 (MTF). 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 of 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 an 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 these ventures.

DLT trading facility licence

Since many distributed ledger technology (DLT) based infrastructures have an integrated approach to exchange and post-trade services, Switzerland has introduced, as of 1 August 2021, a new category of FMI tailored to the specifics of a DLT-based multilateral exchange of ledger-based securities with direct access by retail clients that allows for operating matching, execution, clearing, settlement and custody within the same legal entity. Additionally, cryptocurrencies are allowed to be traded on a DLT trading facility.

Custody

How are cryptoasset custodians regulated?

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

Normal custody of payment and asset tokens

Simple custody of asset tokens with the power to dispose of private keys is only subject to the AMLA. However, the activity of a central securities depository is subject to a FINMA licence. In contrast, the custody of a payment token can also be subject to a banking or fintech licence if the custody wallet provider maintains the private keys and does not fully segregate the tokens per individual client on a technical level or on a book-record level and is not contractually obligated to keep the payment tokens ready at all times for the client.

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 FinSA. This activity lacks, as a minimum, the requirement of the activity carried out for customers concerning 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 transfer of the assets 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 FinSA as long as its service is limited to custody per se. However, if a sale of cryptoassets considered to be financial instruments is only possible via an account with the provider of custody services, for example, because the private key is located therein, a financial service under FinSA is likely to exist.

Central securities depository of asset tokens

A central securities depository is a category of FMI subject to a FINMA licence. 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), or both. According to our view, the pure issuance of security tokens or payment tokens does not qualify as a securities settlement system or a payment system, provided that the respective blockchain or DLT is actually operated in a decentralised manner.

Since a fully-fledged security cryptoasset exchange usually intends to offer post-trading services requiring a licence as a central securities depository, attention is needed that one legal entity is not allowed to hold two different FMI licences. Thus, two legal entities would be required for these projects.

All custody providers with any means to convey over the cryptoassets of their clients, are subject to the AML provisions. This means it may not only include the power to dispose of the private keys but also any means to influence or control the smart contract enacting transfers provided that there is a permanent business relationship with the client (such as registration, account, login and contractual agreement).

Broker-dealers

How are cryptoasset broker-dealers regulated?

Licence requirements and duties of conduct

Professional trading in securities (ie, asset tokens) typically requires authorisation according to the Financial Institutions Act as a securities house granted by the 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 time (eg, own-account dealers and market makers);
- on behalf of third parties (eg, client dealers);
- by 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 that acquire or dispose of asset tokens in secondary trading on behalf of clients qualify as financial service providers, according to the FinSA, and 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 FINMA derivatives trading obligations 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 and 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 and order matching

Usually, order-matching mechanisms are organised centrally, which often triggers an FMI-licence requirement as a stock exchange, multilateral trading facility or organised trading facility. In the case of completely decentralised solutions, no FMI licence would be required.

Since 1 August 2021, a new category of FMI, the DLT trading facility for the trading of ledger-based securities that, according to FINMA, qualify as asset tokens, has been introduced. It allows for multilateral trading with direct retail access.

Clearing and settlement

Often, decentralisation refers to decentralised clearing and settlement processes (ie, peer-to-peer transaction clearing or settlement without trading platform involvement). Therefore, if the trading platform neither operates a smart contract involved in the transaction nor has any power to dispose over the private keys during these transactions, generally, neither AML regulations nor banking or securities-house licence requirements are triggered.

However, if the smart contract is operated by the corresponding trading platform and provides technical control and influence options, these decentralised trading platforms are, under FINMA practice, generally at least subject to the AMLA, because they have control over third-party assets through the confirmation, release or blocking of orders. In particular, DeFi structures often come into the scope of the AMLA because it covers also support in transacting in cryptocurrencies within permanent business relationships.

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 these transactions or the smart contract conducting these transactions, the AMLA will apply.

Even non-custody wallet providers can be in scope of the AMLA if they are considered supporting transactions in cryptocurrencies within permanent business relationships.

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

Trading with anonymous parties
Does the law permit trading cryptoassets with anonymous parties?

Generally, the law does not prohibit trading with anonymous parties. However, FINMA Guidance of February 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. Finally, sanctions regulations according to the Embargo Act (EmbA) must be considered.

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 FMIA recognition 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.

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

There are no restrictions in Swiss law in this regard, except that:

- the Swiss client must check if the FMIA derivatives-trading obligations apply in connection with derivatives transactions; and
-

in official FINMA-practice in connection with decentralised exchanges (DEX) for payment tokens, every user is considered to be a money exchange service provider under the AMLA if he or she acts on a professional basis.

Taxes

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

Generally, all types of cryptoassets and corresponding transactions are subject to federal, cantonal and communal taxes, such as income, wealth and profit tax, stamp duty and withholding tax or value added tax.

The Federal Tax Administration has introduced the following.

- On 27 August 2019, it published a working paper on cryptocurrencies and initial coin offerings and initial token offerings in connection with wealth, income and profit tax, withholding tax and stamp duty, in which they particularly state that they are guided by the token classification of the FINMA ICO Guidelines (lastly amended on 3 August 2022).
- It amended its 'VAT Information 04' brochure on 1 January 2018 with a section on services in connection with blockchain and distributed ledger technology.

All federal, cantonal and communal tax authorities allow for the filing of tax rulings and have collected considerable experience over many years.

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 neither declared any cryptocurrency as legal tender nor issued its own cryptocurrency (yet). However, every person is free to accept cryptoassets as a lawful form of payment and it can also be agreed to pay in cryptoassets on a contractual basis.

The canton of Zug has been dubbed 'Crypto Valley', as in the Silicon Valley of cryptocurrencies, and accepts cryptocurrencies Bitcoin and Ether as means of payment since 2017 for defined fees and 2020 for tax payments. At the Commercial Register Office of the canton of Zug, fees can be paid using Bitcoin and Ether cryptocurrencies. The Swiss National Bank assessed in a project with SIX Group if 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 within the (normal) token category of payment tokens.

Banks and other financial institutions

Do any banks or other financial institutions allow cryptocurrency accounts?

Generally, Swiss banks or other financial institutions are allowed to provide cryptocurrency accounts. On the one hand, many banks and other financial institutions still refuse to do so because they, in particular, assume the regulatory risks to be too high and because they often do not have the required know-how (yet). However, this is changing slowly. On the other hand, the Financial Market Supervisory Authority (FINMA) has, in particular, already granted two full-bank and securities-house licences to Swiss institutions mainly focused on crypto-based financial services, including providing cryptocurrency accounts. Several bank licence, securities dealer licence and fintech licence applications are still pending with the FINMA. There are also further crypto storage service providers in the market being structured in a way that does not require a banking and securities-house licence.

CRYPTOCURRENCY MINING

Legal status

What is the legal status of cryptocurrency mining activities?

Mining (proof-of-work blockchains)

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 concerning 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 under FinSA. If, for example, cryptoassets with the sole function of a cryptocurrency are mined, the miner is not a financial service provider under article 3(d) of FinSA.

By contrast, if cryptoassets are mined that constitute financial instruments within the meaning of 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 on the practical terms of 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.

Staking (proof-of-stake blockchains)

If someone operates a staking node with its own assets, it neither constitutes a financial service nor is it subject to AML or banking regulations.

However, if someone acts as a staking service provider for 'staking clients', it is subject to AML regulations and depending on the type of wallet structure – fully segregated per client or pooled – also to the banking regulations with fintech or even banking licence requirements. Further, the payouts of staking rewards are not considered interest payments under Swiss banking regulations as they are paid by the protocol and not the staking service provider.

These general explanations relate exclusively to staking services relating to proof-of-stake-based blockchains and the provision of validations services. All other forms of staking, in particular the common or untechnical use of the term staking for blocking assets for receiving a yield without any further requirements, usually qualify as securities under Swiss law and are, therefore, subject to securities regulations.

Government views

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

The Federal Counsel has explicitly addressed mining in its Digital Ledger Technologies Report published on 14 December 2018 and in its Report on Virtual Currencies published on 25 June 2014 regarding AML provisions and the offering of financial services under FinSA. Apart from that, no additional official comments have been made so far.

With regard to staking in proof-of-stake-based blockchains by providing validation services, the Swiss regulator FINMA has not yet officially announced its view on regulatory implications. Therefore, there is some uncertainty about staking. However, there is always the possibility to file for a non-action letter (ruling) with FINMA to get full legal certainty.

Cryptocurrency mining licences

Are any licences required to engage in cryptocurrency mining?

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

With regard to staking for third persons in proof-of-stake-based blockchains by providing validation services, AML regulations apply and depending on the wallet structure, a fintech or banking licence may be required.

Taxes

How is the acquisition of cryptocurrency by cryptocurrency mining taxed?

If the mining activity qualifies in the specific case of a commercial or gainful activity, earnings stemming from mining fall within the scope of income or profit tax, so the income or profit generated by mining is taxable 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 distributed, decentralised blockchain or distributed ledger is generally not subject to any authorisation requirements. However, in certain specific cases, an authorisation as a central security depository or because a DLT trading facility 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, decentralised blockchains or distributed ledgers. However, node operations within the new DLT trading facility are regulated. However, the practice of the Financial Market Supervisory Authority is still unknown. Finally, Swiss sanctions regulations (in particular the Embargo Act) apply also to Swiss-based operators of blockchain/DLT nodes.

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

A DAO is 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, guaranteeing that the organisation behaves as described.

However, DAO is neither a fixed term in Swiss law nor has it a defined structure. Therefore, it must be analysed in detail based on specific characteristics on a case-by-case basis.

In many cases, especially when an asset is raised from several users to finance the DAO and its activities and if these users have voting rights, a DAO often qualifies as a collective investment scheme. Further, in many other cases, a DAO would at least be qualified as a simple partnership according to the CO, since it is a catch-all provision.

DAO assets
Who owns the assets of a DAO?

Since DAO are neither explicitly defined in Swiss Law nor have a specific structure, an assessment on the ownership of assets has to 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?

Concerning 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 conventionally take place. 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 the computer system only, because this has no legal personality within the meaning of the Swiss Civil Code. The application of the applicable provisions on the performance of the contract to a smart contract that directly concerns this area also raises questions.

Thus, in the event of defective performance of the contract, the question of liability arises; for example, liability for programming errors or machine errors despite correct programming. The question also arises as to whether the application of articles 197 of the Code of Obligations (CO) (warranty for defects in the purchased item) and 367 of the CO (liability for defects in connection with carried out work) are possible in certain cases of technical program 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 necessarily know its counterparty. As things stand today, the doctrine recommends that parties conclude a smart contract with suitable mechanisms for possibly changing circumstances and for settling disputes. There will certainly be further developments in the area of smart contracts, but these have only just begun.

If a smart contract is deployed within the new DLT trading facility, the enforceability of said contract has to be ensured by the platform according to the Financial Market Infrastructure Act provisions.

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. Generally, most software will be protected by copyright law.

Patents protect technical inventions, namely, new and non-obvious solutions of technical problems. By principle, however, computer programs as such may not be patented. However, if computer programs are used to implement technical solutions for technical problems,

a 'computer-implemented invention' may be eligible for patent protection under certain circumstances.

The registration of a software patent is usually not possible and, in light of the aforementioned facts, often 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?

Since the enactment of the digital ledger technologies (DLT) Bill on 1 February and 1 August 2021, Switzerland is still waiting for Swiss Financial Market Supervisory Authority (FINMA) to grant the first licence for a DLT trading facility. It will be interesting to see if this will kick-off a bigger trend towards tokenisation and asset tokens (ie, securities).

As the Swiss people rejected in a public vote the partial abolition of the Swiss withholding tax on notes in September 2022, Switzerland will continue not to be a favourable product issuance place. However, there are interesting equity-based certificate structures still possible and the introduction of ledger-based rights will certainly boost this industry.

NFTs are still popular and are, in most cases, not subject to Swiss financial market regulations, which makes Switzerland an interesting issuing place.

FINMA announced that entities offering staking services generally require a banking licence under the Banking Act. FINMA argues that because of the temporary locking of assets by staking protocols and the risk that assets could be seized from participants in cases of improper validation (slashing) the assets are no longer immediately available and therefore are considered public deposits which require a banking licence. However, this plannend new FINMA practice is strongly opposed by the industry and the outcome remains to be seen.

Swiss crypto companies that offer their products or services to EU countries will need to assess whether their business activities are subject to the European Union regulation on markets in crypto assets (MiCA) or – with regards to cryptoassets that constitute financial instruments, such as securities – the EU Directive on markets in financial instruments (MiFID II). Since MiCA aims at covering the range of cryptoassets in the broadest way possible, it is likely that MiCA will have an impact despite being out of scope of Swiss financial market regulation. This is especially the case for pure utility tokens. Furthermore, Swiss cryptoasset service providers that wish to provide their services in the EU must be registered and authorised in the EU. The reverse solicitation exemption is applicable to Swiss and other third-country cryptoasset service providers that provide their services at the own exclusive initiative of a client in the EU. The definition and scope of the reverse solicitation is however restrictive.

Finally, linking decentralised autonomous organisations (DAOs) to Swiss associations has become very popular as Swiss associations have no interests or shares that are controllable and associations are very flexible legal instruments.