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HOW CRYPTO-TOKENS QUALIFY UNDER SWISS LAW: A COMPREHENSIVE FRAMEWORK

Ronald Kogens / Dr. Catrina Luchsinger Gähwiler

Blockchain technology has become a reality as part of the digitalisation of the economy. Every day, there is proof of disruptive transformations of long-standing mechanisms into new ecosystems on the blockchain. While existing market participants are in many cases overwhelmed by the new normal, the new players operate with the greatest creativity and efficiency.

There are no limits to the new ecosystems. The blockchain offers countless possibilities of disintermediation, of participating in and transferring assets, of recordkeeping and of creating e-commerce beyond the boundaries of national currencies. And we are only at the beginning of this transformation.

Tokens created on the blockchain can be used to represent a wide variety of instruments and processes. For example, a new means of payment can be created or indirect rights to shares, loans or access rights can be digitised. The legal qualification of the tokens is a major challenge due to the aforementioned diversity.

The important (and not so new) principle for finding your way around in this new digital environment is: "***first analyse the context, then undertake the legal classification under the rules of the existing laws***." The hybrid nature of many tokens will defy the clear categories within which the law is typically structured and any attempt to commence by looking at traditional legal instruments and impose them on the tokens of the new ecosystems will therefore fail. Instead each token has to be taken apart and its components must be qualified individually.

In order to bring the tokens of the new ecosystems closer to the public, FRORIEP's Disruptive Technologies Practice Group has developed a Token Framework. In doing so, a distinction is made between cryptocurrencies, tokens giving title to monetary claims and tokens for other purposes. Tokens giving title to monetary claims are further categorised as being either debt, equity or participation rights tokens. These subcategories stem from the financial treatment of the obligations on the balance sheet or (in the case of participation rights tokens) on the profit & loss statement of the issuer.

The following diagrams show the possible functions of tokens on the blockchain and the FRORIEP Token Framework.

UTILISATION OF THE BLOCKCHAIN

Disintermediation

- Digital Rights Management
- Escrow
- Execution Assistance for traditional Contracts
- Automated Due Diligence (.e.g. KYC)
- Trading
- Repo-Transactions
- Resource-Sharing

Payments & Storage

- E-Commerce
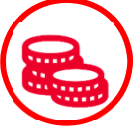- Remittance Services
- Storing of Value
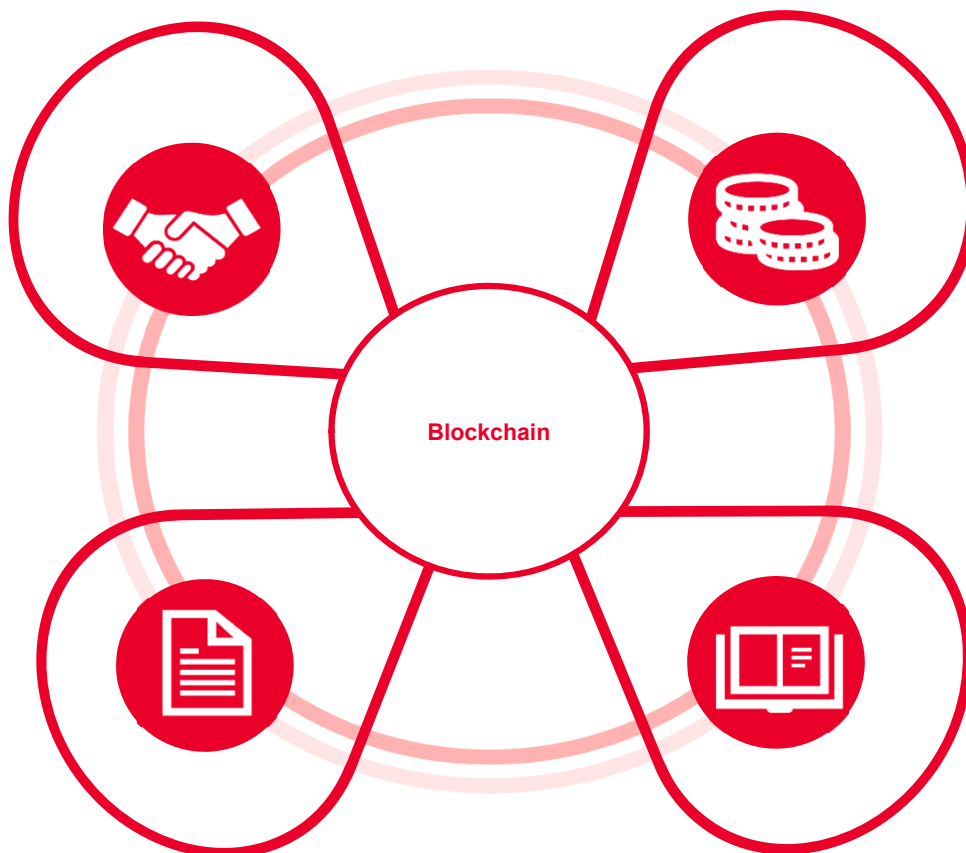
Financing, Investment, Hedging

- Equity
- Lending
- Derivatives
- Structured Products
- Other Financial Instruments

Record Keeping

- Medical Records
- Title Records
- Proof of Ownership
- Voting
- Intellectual Property
- Payments
- Proof of Identity
- Proof of Origin
- Proof of Membership

Possible Framework of Tokens under Swiss Law

	Cryptocurrency	Tokens are Title to Monetary Claim			Token for other Purposes
		Constitutes Liability or Equity of Issuer		**Revenue driven Compensation other than Profits**	
Context of Token	**Virtual Currency** • The coin does not provide any rights other than to have it exchanged into other currencies • Intention to create ecosystem of persons accepting coin as method of payment	**Debt Token** • Repayment obligation (e.g. loan, structured product, investments) or payment obligation (e.g. asset sale) • limited in time or call/put-option; • E.g. interest payments (fixed or linked to revenues) • May be subordinated	**Equity Token** • Represents a partial share or a partial participation certificate • unlimited in time, but right to liquidation proceeds • reward based on profit of the company • rewards are dependent on dividends	**Participation Rights Token** • Unlimited in time • Periodical reward based on success of the company • rewards are dependent on revenue and not on profit (not dividends) • Can include certain voting rights or other membership rights	**Utility Token** • Tokens are very versatile and can take other form than virtual currencies or token for financing • E.g. crowdfunding linked to voting rights, owner-ship rights, discounts, access rights, receipt of future good or service from issuer or affiliate of issuer)
Consequences under Private Law	**Code of Obligations and Civil Code** • Asset (digital code) • No specific consequences under private law	**Code of Obligations and Civil Code** • Prospectus requirements if token is bond	**Code of Obligations and Civil Code** • Prospectus requirements apply for equity participations Depending on the type of shares and the number of shares held, KYC may be required (commercial law duty)	**Code of Obligations and Civil Code** • Prospectus requirements apply for equity participations • Depending on the type of shares and the number of shares held, KYC may be required (commercial law duty)	**Code of Obligations/ Civil Code** • Depending on the actual features of the token
Consequences financial market laws	**Anti Money Laundering Act** • Qualifies as a payment instrument • Issuer is a financial intermediary and is required to do KYC and AML-review upon issue of token	**Anti Money Laundering Act** • Might not be applicable, nevertheless at least KYC should be done "best practice and sustainability approach"	**Anti Money Laundering Act** • Might not be applicable, nevertheless at least KYC should be done "best practice and sustainability approach"	**Anti Money Laundering Act** • Might not be applicable, nevertheless at least KYC should be done "best practice and sustainability approach"	**Anti Money Laundering Act** • Might not be applicable, nevertheless at least KYC should be done "best practice and sustainability approach"
	Collective Investment Schemes Act • Generally not applicable	**Collective Investment Schemes Act** • If collective investment scheme (pooling of funds, investment decision with the issuer and activity of issuer is solely to invest pooled funds in other projects) then regulatory requirements • Prospectus requirements if token is structured product or right to collective investment scheme	**Collective Investment Schemes Act** • If collective investment scheme (pooling of funds investment decision with the issuer and activity of issuer is solely to invest pooled funds in other projects) then regulatory requirements • Prospectus requirements if right to collective investment scheme	**Collective Investment Schemes Act** • If collective investment scheme (pooling of funds investment decision with the issuer and activity of issuer is solely to invest pooled funds in other projects) then regulatory requirements • Prospectus requirements if right to collective investment scheme	**Collective Investment Schemes Act** • Generally not applicable, however, depending on the actual features of the token
	Banking Act • Generally not applicable	**Banking Act** • Banking regulation may apply if debts on which interest is paid	**Banking Act** • Generally not applicable	**Banking Act** • Generally not applicable	**Banking Act** • Generally not applicable
	Financial Market Infrastructure Act • Generally not applicable	**Financial Market Infrastructure Act** • If tokens: (i) represent a "right to claim"; (ii) are suitable for mass standardised trading; and (iii) will be publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, then tokens may qualify as a security*	**Financial Market Infrastructure Act** • If tokens: (i) represent a "right to claim"; (ii) are suitable for mass standardised trading; and (iii) will be publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, then tokens may qualify as a security*	**Financial Market Infrastructure Act** • If tokens: (i) represent a "right to claim"; (ii) are suitable for mass standardised trading; and (iii) will be publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, then tokens may qualify as a security*	**Financial Market Infrastructure Act** • If tokens: (i) represent a "right to claim"; (ii) are suitable for mass standardised trading; and (iii) will be publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, then tokens may qualify as a security*

* Qualification of tokens as securities has no direct consequences, however, if the issuer offers trading services of tokens, such activity may qualify as organized trading facilities for which a permission by the Swiss Financial Market Authority is required

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Ronald is a specialist in IT law and financial market law.
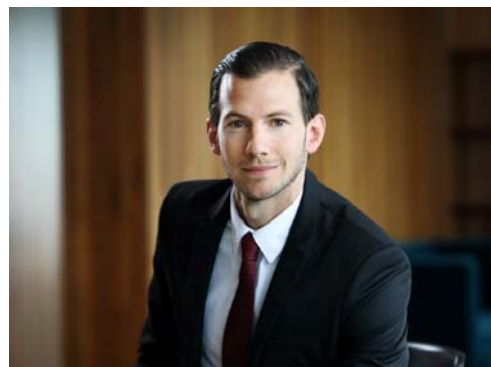
- Practice focuses on technology and life sciences transactions
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  sizes, from start-ups to established players, as well as investors, suppliers and customers across a broad rankge of industries and sectors
- In-depth knowledge of IP/IT law, in particular licensing of IP-rights, IP-transaction and contract law
- Expert in the field of blockchain technology, crypto-currencies and crypto-tokens
- Graduated from the University of Lucerne in 2011 and admitted to the St. Gallen Bar in 2012. In 2016 he was awarded a Master of Laws (LL.M.) in business law from the Chapman University, California, United States
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