

Switzerland



Cryptoassets & Blockchain

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; use of cryptoassets for investment, financing, trading and payments; cryptocurrency mining; blockchain and other distributed ledger technologies; and recent trends.

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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 crypto assets. 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. FINMA differentiates between three distinct types of cryptoassets and refers to these assets as tokens (ie, asset (security) token, payment token and utility token).

Depending on the nature of a cryptoassets, 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.

From a civil law standpoint, two types of token 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').

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 (the DLT Bill) making the Swiss crypto regulatory framework one of the most advanced in the world. The following main change is scheduled to enter into force on 1 February 2021:

- in the Swiss Code of Obligations (CO), register value rights should be treated as a new form of securities in addition to uncertificated rights, certificated securities and book-entry securities, if they were created and transferred on a register, such as DLT (no further transfer requirements).

The following main changes are scheduled to enter into force on 1 August 2021:

- in 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 will require such pooled wallet providers with off-balance sheet cryptoassets to apply for a fintech licence, even if the crypto asset's value exceeds the 100 million Swiss-franc limit.

- in the FMIA, a new authorisation category for 'DLT trading facilities' is introduced. It functions similarly to the existing multilateral trading facilities but allows for direct access of retail participants and further services on the trading value chain, such as clearing, settlement and custody services.

To implement those changes fully, the Federal Department of Finance has proposed corresponding amendments to several ordinances in a draft framework ordinance (the Draft DLT Ordinance).

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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 in which it qualifies the different types of cryptoassets into three categories and were supplemented on 11 September 2019 regarding stable coins.

Law stated - 30 October 2020

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;
- issuing of a declaratory ruling;
- prohibition from practising a profession;

- publication of the supervisory ruling;
- confiscation of an unlawful profit;
- the appointment of investigating agents;
- licence revocation or approval; and
- liquidation of a company.

Usually, acting without a licence without having one (illegal activity) is also a criminal act that will be prosecuted by the criminal prosecution authorities.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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 the legal ownership, transaction and exchange of cryptocurrency. In some cases, anti-money laundering provisions or licence requirements may apply.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

Industry associations

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

The Swiss Blockchain Federation and Crypto Valley Association lead in this field.

Law stated - 30 October 2020

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 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 cryptoassets will usually be subject to the Anti-Money Laundering Act (AMLA);
- utility tokens: intended to provide access (digitally) to application 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 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.

The new Digital Ledger Technologies (DLT) Bill will define the term cryptoassets regarding the applicability of the Banking Act (BA) and thus the need for a banking licence.

Accordingly, cryptoassets are crypto-based assets, which 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.

Law stated - 30 October 2020

Investor classification

How are investors in cryptoassets classified and treated differently?

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

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

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

Law stated - 30 October 2020

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 provision 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 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 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.

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.

Law stated - 30 October 2020

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).

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 less 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.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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 required activity from the receiving party, the receiving party has not made an investment decision; therefore, there is generally no prospectus requirement.

Law stated - 30 October 2020

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 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.

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

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

Crowdfunding

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

According to Swiss regulations, four crowdfunding categories must be differentiated:

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

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

With the new DLT Bill, the threshold for the fintech licence will be amended so that the 100 million Swiss franc limit will not apply for cryptoassets regarding the BA, provided that they will not be invested and that no interest will be paid.

Law stated - 30 October 2020

Transfer agents and share registrars

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

No specific laws govern these services. Generally, AMLA must be observed for transferring any kind of cryptoasset qualifying as a financial instrument. In particular, changing cryptocurrency into another cryptocurrency or fiat currency is considered to be money exchange or remittance; therefore, is subject to AMLA. Also, the provision of cryptoasset transfer services will trigger anti-money laundering obligations, if the service provider conveys over the private key of its clients.

Law stated - 30 October 2020

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?

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 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 AMLA must join a self-regulatory organisation. Those private self-regulatory organisations recognised by FINMA will impose their own rules and supervision regarding AML compliance on their members.

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

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

The extent of the aforementioned 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 AMLA.

Law stated - 30 October 2020

Sanctions and Financial Action Task Force compliance

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

The Federal Embargo Act (FEmBA) 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 United Nations sanctions are directly applicable in Switzerland and must be regularly observed, particularly when providing financial services. Business relationships with a sanctioned person may not be commenced or have been terminated respectively.

United Nations and the FATF anti-terrorism financing principles are implemented by FEmBA sanction's legislation and AMLA, particularly the enhanced due diligence and notification duties, including the Travel Rule.

Law stated - 30 October 2020

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 from 1 January 2021) and its beneficial owner must be identified if there is a minimum of 25,000 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.

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 name, address and wallet address of the sending party and the name and wallet address of the receiving party).

Trading in cryptotassets, 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 exchanges dealers may not accept public deposits unless they have a banking licence. The same applies to cryptoasset dealers, who convey over the private keys of their clients. However, depending on the number of funds collected, a fintech licence may be obtained.

Law stated - 30 October 2020

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 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 payment or 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. Only regulated participants may trade on such an FMI (ie, no retail clients).

An authorised bank or securities house may run an organised trading facility on which financial instruments other than securities may be traded. Organised trading facilities are also directly accessible to retail clients. Trading platforms for payment tokens are not subject to an FMI licence if they offer only spot transactions. Trading only utility tokens triggers no FMI licence requirements as utility tokens do not qualify as financial instruments.

Trading platforms – clearing and settlement

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

even require 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.

New developments

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

Law stated - 30 October 2020

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 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 the banking regulations if the custody wallet provider maintains the private keys and does not fully segregate the tokens per individual client on a technical level (ie, not only on a book-record level). Segregation requirements will be eased with the new DLT Bill to the requirements of individualisation based on records only. However, these pooled accounts will require a fintech licence.

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 tokens 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.

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.

With the new Draft DLT Ordinance, all custody providers with any means to convey over the cryptoassets of their clients, shall be subject to the AML provisions. These means it may not only include the power to dispose over the private keys but also include any means to influence or control the smart contract enacting transfers. These new requirements, however, currently reflect FINMA standing practice.

Law stated - 30 October 2020

Broker-dealers

How are cryptoasset broker-dealers regulated?

Licence requirements and duties of conduct

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

- on its own account on the secondary market with the intent of reselling them within a short 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 payment or 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).

Law stated - 30 October 2020

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.

The new DLT Bill introduces a new category of FMI, the DLT trading facility for the trading of register-based cryptoassets that, according to FINMA, qualify as asset tokens.

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 AMLA, because they have control over third-party assets through the confirmation, release or blocking of orders. This standing practice will now be codified in the new Draft DLT Ordinance.

Law stated - 30 October 2020

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 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, AMLA will apply.

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

Law stated - 30 October 2020

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 02/2019 'Payments on the blockchain' clarified that financial intermediaries doing orders with payment tokens must fully comply with the travel rule according to FINMA's Anti-money Laundering Ordinance and there is – contrary to the Financial Action Task Force recommendations – no exception in Swiss AML regulations for payments involving unregulated wallet providers.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

Taxes

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

Generally, all types of cryptoasset and corresponding transaction 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; and
- it amended its 'VAT Information 04' brochure on 1 January 2018 with a section on services in connection with blockchain and distributed ledger technology.

Law stated - 30 October 2020

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 validly 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 since 2020 for tax payments. At the Commercial Register Office of the canton of Zug, fees can be paid using the Bitcoin and Ether cryptocurrencies. The Swiss National Bank is assessing 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.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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, most banks and other financial institutions refuse to do so because they particularly assume the regulatory risks to be too high and because they often do not have the required know-how (yet). On the other hand, the Financial Market Supervisory Authority (FINMA) has 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 FINMA. There are also further crypto storage service providers in the market being structured in a way not requiring a banking and securities-house licence.

Law stated - 30 October 2020

CRYPTOCURRENCY MINING

Legal status

What is the legal status of cryptocurrency mining activities?

The mining of tokens in itself does not constitute a financial service within the meaning of article 3(c) of the Financial Services Act (FinSA). It does not fulfil the requirement of an activity performed for clients 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 in practical terms on the purchase or sale of financial instruments or the acceptance and brokering of orders that involve financial instruments.

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

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

Taxes

How is the acquisition of cryptocurrency by cryptocurrency mining taxed?

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

Law stated - 30 October 2020

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 – once the new DLT Bill enters into force in 2021 – 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.

Law stated - 30 October 2020

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 will be regulated from 2021 too. However, the details of this regulation and the practice of the Financial Market Supervisory Authority are still unknown.

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 the 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.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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.

Law stated - 30 October 2020

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

Law stated - 30 October 2020

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

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

Law stated - 30 October 2020

UPDATE AND TRENDS

Recent developments

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

Currently, the Libra Association, which was created by Facebook, intends to launch its new cryptocurrency. According to the Financial Market Supervisory Authority (FINMA), Libra will require an authorisation as a payment system as a bare minimum. Also, AML and counter terrorism financing regulations lie in FINMA's particular focus too. The need for further extra supervision in this area depends on how the Geneva-based Libra Association plans to manage the funds and, according to FINMA, who would bear the risk of losses. It could conceivably need an additional authorisation as a collective investment scheme, such as a fund, or as a bank.

After the decision of the Swiss Parliament on 25 September 2020 to amend several federal laws with the new Digital Ledger Technologies (DLT) Bill to include cryptoassets and DLT into Swiss Law, which scheduled to enter into force on 1 August 2021 and the Federal Department of Finance published the Draft DLT Ordinance, which is a proposal to amend various corresponding ordinances. The consultation period is still ongoing and the final wording is not yet clear.

The information in this chapter was verified between October and December 2020. This chapter was co-authored by Lukas Lezzi, who has since left the firm.

Law stated - 30 October 2020

Jurisdictions

	Australia	Piper Alderman
	Austria	Schoenherr
	India	AZB & Partners
	Japan	Mori Hamada & Matsumoto
	Liechtenstein	Niedermüller Rechtsanwälte Attorneys at Law
	Luxembourg	CMS Luxembourg
	Mexico	Ramos, Ripoll & Schuster
	Portugal	Morais Leitão, Galvão Teles, Soares da Silva & Associados
	Singapore	RHTLaw Asia LLP
	South Korea	Bae, Kim & Lee LLC
	Switzerland	MLL Meyerlustenberger Lachenal Froriep Ltd
	Taiwan	Lee and Li Attorneys at Law
	Turkey	SRP Legal
	USA	Nelson Mullins Riley & Scarborough LLP