

Cryptocurrencies as contribution in kind for foundations and capital increases

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I. Introduction

Every time a stock corporation or a limited liability company¹ is incorporated or increases its capital, the subscriber incurs a liability to pay. The subscription of future shares, i.e. the unconditional obligation to make a contribution corresponding to the issue amount, gives rise to this debt; the subscriber fulfills it by placing the promised contribution at the free disposal of the company. The future shareholder can fulfill the payment obligation - classically - by way of cash payment, i.e. by placing the promised sum of money in CHF or a foreign currency² into a capital contribution account at a Swiss bank within the meaning of Art. 3 ff. Federal Law on Banks and Savings Banks (BankG), which blocks the deposited amount until the registration of the formation or capital increase transaction in the Commercial Register and then pays it out to an operational business account of the Company. From that moment on, the responsibility (under civil and criminal law) for the use of the share capital exclusively for corporate purposes lies with the Board of Directors of the Company. In addition, the subscriber can also fulfill his obligation to pay by means of a contribution in kind. In this case, the incorporation or capital increase is referred to as qualified. The subscriber will do so in particular if either cash is not to be used for the payment or (as in connection with companies active in the crypto and blockchain sector) there is a practical need for alternatives to cash payment (see below).

II. Practical need for alternatives to cash payment in crypto and blockchain companies

1. Capital contribution account with an institution subject to the BankG

The Swiss Code of Obligations requires the deposit of the payment obligation into a capital contribution account at an institution subject to the Banking Act (Art. 633 para. 1 CO). Deposit into a capital contribution account at a bank abroad is thus excluded. The future shareholder is subsequently dependent on the positive decision of the Swiss branch of a bank when making the payment.

Since the start of the blockchain wave in Switzerland, the regulatory pressure on Swiss banks has grown steadily, as the money laundering risk for companies operating in this area is considered to be particularly high internationally. As expected, the legislator has set the audit obligations of Swiss financial institutions high and made them even stricter. The result is an increasingly stringent AML/KYC practice of the Swiss banks³, partly

¹ For the purpose of better readability, the following will refer only to stock corporations. However, the topics discussed are equally transferable to the limited liability company.

² The EHRA has permitted payment in freely convertible foreign currencies since 2004, cf. HANDSCHIN/CRAMER, Gründung und Kapital bei AG und GmbH - ausgewählte Fragen, Gesellschaftsrecht und Notar - Beiträge der Weiterbildungsseminare der Stiftung Schweizerisches Notariat vom 1. 9. 2015 in Zurich and from 8. 9. 2015 in Lausanne, p. 39 ff. (p. 60 f.) with further references. Accordingly, the Swiss banks open capital contribution accounts also in foreign currencies, whereby it must be noted that the amount in foreign currency must cover the share capital - which continues to be denominated in CHF - taking into account fluctuations in the exchange rates on the day of notarization, entry in the daily register and approval by the EHRA (cf. HANDSCHIN/CRAMER, *ibid.*).

³ The Federal Council recognizes the problem and expresses that (own translation) "in practice [...] the opening of bank accounts pose[s] a challenge for these startups as well as for the banks," cf. Federal Council Report of 14 Dec. 2018 on the Legal Basis for Distributed Ledger Technology, p. 16.

shaped by due diligence rules codified within the industry⁴, accompanied by an increasing standardization of the account opening process at central departments of the companies - usually via online onboarding with verification of the account opener's personal data through external service providers. As a rule, this leads to extensive requests for information on the part of the banks, and in many cases also to a refusal to open the capital contribution account legally required for the formation or capital increase as soon as the company purpose is even remotely related to blockchain technology.

The requirements of the banks are even more far-reaching when opening an operational bank account, without which a company is effectively incapable of acting. In consulting practice, the opening of operational accounts abroad, for example with financial institutions in Great Britain and the Baltic States, has proven to be a successful alternative, which in some cases also offers account management in CHF. The management of an operational account abroad is permitted by law. The transfer of the share capital paid into the capital contribution account to a foreign account, even one in a foreign currency, is regularly accepted by Swiss banks, provided that the operating account is in the exact name of the Swiss company.

2. Legal right to open a bank account?

With Directive 2014/92/EU, the European Union instructed its member states to ensure that payment accounts with basic functions are offered to consumers by all or a sufficiently large number of credit institutions so that all consumers have guaranteed access to such an account and distortions of competition are avoided (Art. 16 Par. 1 Directive 2014/92/EU). The Directive was implemented in the Federal Republic of Germany, by the so-called Payment Accounts Act (Zahlungskontengesetz), which grants consumers legally resident in the European Union a legal right to conclude a so-called basic account agreement. Despite criticism⁵, there is no corresponding legal entitlement for entrepreneurs (regardless of their legal form).⁶

In Switzerland, there is no explicit legal entitlement to conclude a comparable basic account agreement.⁷ However, the Federal Supreme Court has in the past affirmed that Swiss Post is obliged to conclude an agreement, since as an institution under public law it is obliged to ensure a nationwide basic provision of postal and payment services.⁸ At the cantonal level, there was a proposal in the canton of Zug in the context of a total revision of the law on the Zuger Kantonalbank, in which an explicit obligation to contract on the part of the Zuger Kantonalbank for contracts with Swiss nationals and persons resident or domiciled in the canton of Zug was under discussion.⁹ However, such a provision was ultimately not implemented, not least because of FINMA's supervisory reservations.

3. Liberation of cryptocurrencies by way of cash deposit?

⁴ See, for example, Art. 10 of the Agreement on the Code of Conduct for the Due Diligence of Banks (CDB 20). Pursuant to Art. 35 AMLO-FINMA, CDB 20 has the status of an ordinance.

⁵ Cf. exemplary criticism on the website of the Association of Founders and Self-Employed in Germany e. V., A. LUTZ, Rechtsanspruch auf Bankkonto - Selbstständige ausgenommen, retrieved 5/16/2022, from <https://www.vgsd.de/rechtsanspruch-auf-bankkonto-selbststaendige-ausgenommen>.

⁶ HERRESTHAL, Der Anspruch auf ein Basiskonto nach dem Zahlungskontengesetz (ZKG) - Die Privatautonomie auf dem Rückzug im Bankvertragsrecht, BKR 2016, p. 133 ff. (p. 135).

⁷ See ESSEBIER, Besteht in der Schweiz ein Rechtsanspruch auf ein Bankkonto?, accessed 5/16/2022, from <https://www.vischer.com/know-how/blog/besteht-in-der-schweiz-ein-rechtsanspruch-auf-ein-bankkonto-38482/>.

⁸ BG, Urteil 4A_417/2009 v. 26. 3. 2010, E. 3.4. In this case, the respondents were several companies. Cf. however Art. 45 para. 1 Postal Ordinance (VPG).

⁹ Cf. Report and Proposal of the Pre-Consultative Committee of 19. 6. 2018 on a Total Revision of the Law on Zug Cantonal Bank (Cantonal Bank Law), p. 7.

As the keystone of the comprehensive revision of the Stock Corporation Act, the Federal Council enacted amendments to the CO and the HRegV (Commercial Register Ordinance) on 2. 2. 2022. The revised provisions, which will apply as of 1. 1. 2023, provide, among other things, that share capital may now also be held in currencies other than CHF (cf. in particular Art. 45a revHRegV (revised Commercial Register Ordinance)). The currencies permitted in this respect are determined according to a catalog (Annex 3 revHRegV), which currently comprises four currencies. According to the report on the outcome of the consultation procedure on the amendment of the Commercial Register Ordinance of 10. 12. 2021, seven participants in the corresponding procedure supported the inclusion of cryptocurrencies in the catalog - including the Canton of Neuchâtel - whereas only one participant explicitly opposed this extension.¹⁰ Deviating from this tendency within the consulted circles, however, the issuer of the ordinance did not, as a result, permit any crypto (or other national) currencies.¹¹ As a consequence, a payment in cryptocurrencies by way of cash deposit is ruled out de lege lata.¹² From the author's point of view, however, the Federal Council should reconsider this decision in the context of future ordinances. This applies in particular if, as is to be expected, more far-reaching international regulation of blockchain/distributed ledger technologies and their interfaces to the existing currency system takes place¹³ and AML/KYC concerns can accordingly be taken into account more extensively in connection with cryptocurrencies as well.

4. Payment in cryptocurrencies by way of contribution in kind.

For the time being, an alternative is to make a payment in cryptocurrencies by way of a contribution in kind. In order for amounts in cryptocurrencies to serve as contributions in kind, they must, in particular, be capitalizable, freely transferable, freely available and realizable in accordance with the general requirements for contributions in kind.¹⁴ The Commercial Register Office of the Canton of Zug (HRA Zug) considers it to be an indication that the above criteria are met if a certain cryptocurrency has a comparatively large trading volume and a relatively high market capitalization.¹⁵ Accordingly, Bitcoin (BTC) and Ether (ETH) are accepted by the HRA Zug as contributions in kind without further ado.¹⁶ On September 25, 2017, it was one of the first cantonal commercial registry offices to enter a non-cash contribution formation with the cryptocurrency Bitcoin (BTC) in the commercial register.¹⁷ Subsequently, other commercial registry offices followed suit.¹⁸ The Zug Commercial

¹⁰ Cf. results report on consultation: amendment of the Commercial Register Ordinance, para. 4.2.3 and fn. 11 ff. there.

¹¹ See also Federal Council media release, 2/2/2022, accessed 5/16/2022, from <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-87016.html>.

¹² Based on current and also future law - Art. 43 para. 1 lit. f HRegV/revHRegV - the question of the feasibility of "cryptocurrency capital contribution accounts" also arises, cf. already MÜLLER/STOLZ/KALLENBACH, Liberierung des Aktienkapitals mittels Kryptowährung, AJP/PJA 11/2017 p. 1318 et seq. (p. 1322).

¹³ For an inventory, see Global Blockchain Business Council, Interactive Map of Blockchain and Digital Asset Regulation, retrieved 5/16/2022 from <https://gbbcouncil.org/gsmi/>. For an overview of the international regulatory coordination underway and an outlook on possible "Central Bank Digital Currencies," see the World Economic Forum's Digital Currency Governance Consortium, accessed 5/16/2022 from <https://www.weforum.org/communities/digital-currency-governance-consortium>.

¹⁴ MÜLLER/STOLZ/KALLENBACH, Liberierung des Aktienkapitals mittels Kryptowährung, AJP/PJA 11/2017 p. 1318 et seq. (p. 1323) with further evidence.

¹⁵ Instruction sheet on payment with a cryptocurrency from the Zug Commercial Register Office of 6. 4. 2018, para. 2.

¹⁶ Instruction sheet on payment with a cryptocurrency from the Commercial Register Office Zug of 6. 4. 2018, Ziff. 2.

¹⁷ Cf. Instruction sheet on payment with a cryptocurrency of the Commercial Register Office Zug of 6. 4. 2018, Introduction.

¹⁸ For example, since August 2018, the SOGC shows 89 new startups under BTC in kind, of which 75 in ZG, 3 in ZH, 2 each in OW and in SZ, and 1 each in BE, GR, LU, NW, SG, SH, and UR; furthermore, in the same period, 49 new startups under ETH in kind, of which 41 in ZG, 4 in ZH, and 1 each in SG, SH, SO, and SZ. For USDT ("Tether"), the corresponding data are: ZG 28, SZ 5, ZH 2 and LU 1; for USDC ("USD Coin"):

Registry Office advises that, in the case of other cryptocurrencies, clarification should be made with the registry in advance.¹⁹ This gives future shareholders of public limited companies active in the crypto or blockchain sector an alternative if they are denied the capital contribution account required for the formation or capital increase. This is all the more obvious because future shareholders of companies operating in these areas will generally already have crypto assets.²⁰

III. Design of the formation and capital increase process

In the following, individual (practical) aspects of the formation or capital increase process are examined in more detail.

1. Establishment

The (qualified) formation of a stock corporation by contribution in kind is, like the formation in cash, subject to notarization. Firstly, the documents generally required for the formation in cash pursuant to Art. 43 para. 1 HRegV²¹ must be submitted to the Commercial Register, i.e. the public deed on the act of formation, the (certified)²² articles of association, a declaration of acceptance of election of the member(s) of the board of directors²³, the declaration of acceptance of election of the auditor (if no opting-out took place), the minutes of the board of directors on its constitution and the regulation of the signing authority of its members²⁴ as well as, if applicable, the declaration of acceptance of domicile (if the company does not have its own offices).

In the case of a contribution in kind with cryptocurrencies, the documents referred to in Art. 43 para. 3 HRegV²⁵ must also be submitted to the commercial register. These include the contribution in kind agreement, the formation report signed by all founders and the unconditional audit confirmation of an auditor.

2. Capital increase

The supporting documents to be submitted to the Commercial Register in case of an ordinary capital increase by means of a contribution in kind of cryptocurrencies result from Art. 46 HRegV. In addition to the documents required for the cash capital increase pursuant to Art. 46 para. 1 HRegV (public document on the resolutions of the general meeting, public document on the findings of the board of directors and on the amendment of the articles of association, adapted articles of association and capital increase report), the documents mentioned

ZG 30, ZH 1. There were sporadic startups with BNB (ZG, BE), DOT ("Polkadot") (SH, ZG) and UST ("TerraUSD") (LU, ZG), as well as with BUSD ("Binance USD"), XRP and SOL ("Solana") (each ZG). Foundations involving ADA ("Cardano") or DOGE ("Dogecoin") could not be detected.

¹⁹ Instruction sheet on payment with a cryptocurrency from the Zug Commercial Register Office of 6. 4. 2018, para. 2.

²⁰ MÜLLER/ZYSSET/KALAITZIDAKIS, Die Einlage von Kryptowährungen zur Gründung einer Gesellschaft, Jusletter 20. 5. 2019, p. 4.

²¹ The new version of Art. 43 HRegV (Art. 43 revOR (revised Code of Obligations)), which comes into force on 1. 1. 2023, takes into account in para. 1 the now given possibility of payment in foreign currencies and remains essentially unchanged.

²² According to the practice of various commercial register offices, a corresponding certification verbal can be waived.

²³ Separate minutes may be omitted if all members of the board of directors sign the commercial register application in the sense of a circular resolution.

²⁴ In practice, the declaration of acceptance of election by the board of directors is regularly combined with the certified specimen signature to be submitted. The submission of a separate declaration of acceptance of election with specimen signature can be dispensed with if the relevant member of the board of directors signs the commercial register application and - insofar as the member is to be granted signing authority - this signature is notarized.

²⁵ Paragraph 3 of Art. 43 revOR only contains changes compared to the previous version insofar as acquisitions in kind are concerned.

in Art. 46 para. 3 must also be submitted, i.e. (also in this case) the contribution in kind agreement and the unconditional audit confirmation of an auditor.

3. The contribution in kind agreement in particular

Pursuant to Art. 635 CO, contributions in kind are only deemed to be cover if they have been made based on a written or (in the case of the contribution of real property²⁶) publicly notarized contribution in kind agreement. In particular, this should specify the quantity and quality of the contribution obligation and determine the imputation value.²⁷ The contribution-in-kind agreement must list or circumscribe and value the assets to be contributed in sufficient detail.²⁸ In practice, the exact quantity of crypto assets to be contributed (e.g. 50 Ethereum [ETH]) will be provided for and substantiated with the corresponding value according to common online portals for price calculation (e.g. <https://www.finanzen.ch>). In view of the high volatility of cryptocurrencies, it is of particular practical importance that the share capital in CHF must be fully covered both at the time of the public notarization and at the time of the entry in the commercial register.²⁹ It is therefore advisable to contribute a larger amount of cryptocurrencies to the company than initially appears necessary for the payment.³⁰ This will also apply to the contribution of so-called stablecoins, i.e. amounts in such cryptocurrencies that are supposed to have a fixed exchange rate to a certain national currency due to the assumed redemption obligation of a third party.³¹

Pursuant to Art. 634 No. 2 CO, the company must still be able to dispose of the contribution in kind immediately as owner after its entry in the Commercial Register. According to the current law, the time of free availability is based on the time of electronic publication in the Swiss Official Gazette of Commerce (SOGC).³² According to the wording of the provision, one could assume that the actual (in rem) transfer does not have to be provided for in the contribution in kind agreement. However, the literature makes a clear distinction according to the objects of the contribution in kind. Whereas in the case of movable property it is said to be sufficient that a transfer of possession pursuant to Art. 922 et seq. CC, it should be sufficient that a transfer of possession can be expected with certainty "immediately after the registration", whereas in the case of rights, an assignment to the company to be formed should already be required upon conclusion of the contribution-in-kind agreement.³³ In order not to deprive the client of the - depending on the existence of the crypto assets on a soft or hard wallet - partly complex questions of the transfer in rem and to ensure availability "immediately after registration in the commercial register", it is therefore advisable to regulate the execution and any additionally required execution acts directly in the contribution in kind agreement, to execute the execution in the presence of the client and to record it in the minutes.

²⁶ A. VOGEL, OFK-HRegV (2020), Art. 43 N. 39.

²⁷ P. BÖCKLI, Schweizer Aktienrecht (2009), § 1 N 396.

²⁸ A. VOGEL, OFK-HRegV (2020), ibid.

²⁹ Cf. Instruction sheet on payment with a cryptocurrency of the Commercial Register Office Zug of 6. 4. 2018, para. 5.

³⁰ Cf. leaflet on payment with a cryptocurrency of the Commercial Register Office Zug of 6. 4. 2018, ibid.

³¹ In volatile market environments, disruptions of such exchange rate pegs have already been observed in the recent past, for example from 9. 5. 2022 for "TerraUSD" and on 12. 5. 2022 for "Tether" ("USDT").

³² Cf. Art. 936a p. 2 CO as well as Art. 34 p. 2 HRegV in the version pursuant to No. 1 of the Ordinance of 6. 3. 2020, in force since 1. 1. 2021. A return to the previous legal situation in the sense of a general retroactive effect of the entry in the commercial register to the time of recording in the daily register was considered in the context of the most recent legal reform, but not implemented, cf. result report consultation: amendment of the Commercial Register Ordinance, No. 9.2 f. Differently - under the old legal situation - still C. CRAMER, ZK-OR (2016), Art. 634 N. 11.

³³ C. CRAMER, ZK-OR (2016), Art. 634 N 12 f.



In any case, it should be ensured that after completion of the execution actions in question, the company alone is factually capable of disposing of the non-cash contribution items. If "ownership residues" remain with third parties, for example in the sense of their potential or actual joint knowledge of the cryptographic private key to the so-called wallet in which the crypto units are then located, the legally required free availability of the corresponding contributions in kind could be in doubt.

4. The statutory provision on contributions in kind, in particular

According to Art. 628 para. 1 CO, the articles of association must specify the object of the contribution in kind and its valuation as well as the name of the contributor and the shares to which he is entitled. In practice, the formulation of the contribution in kind provision often proves to be a problem and may lead to rejections by the competent commercial registry office. In the case of a contribution in kind with cryptocurrencies, a contribution in kind provision can be formulated, for example, as follows:

"The Company acquires [number] Ethereum (ETH) from [name] upon incorporation pursuant to the contribution in kind agreement dated [date], at the price and value of CHF [number] in total, for which [number] fully paid registered shares in the Company with a nominal value of CHF [number] each shall be issued to the contributor in kind at an issue amount of CHF [number] each. Any difference in value of the contribution in kind compared to the issue amount in favor of the Company shall be booked to the legal capital reserve without consideration."

IV. Conclusion

Founders or future shareholders of companies operating in the crypto or blockchain sector are not infrequently confronted with the problem of being denied by banks the capital contribution account required by law for cash payment. Also, cryptocurrencies continue not to be eligible currencies for share capital under the - now relaxed - framework of cash payment rules. However, the contribution in kind incorporation or capital increase with cryptocurrencies provides the aforementioned companies with a viable alternative. The incorporation or capital increase process is subject to notarization; for entry in the commercial register, confirmation by an auditor is required - in addition to other supporting documents. In the case of the contribution in kind agreement, which must also be submitted, particular attention should be paid to the process of transferring the crypto assets to the company in rem.