Crypto Nation Switzerland—A Legal and Regulatory Overview on Recent Developments

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Abstract

The Swiss Financial Market Supervisory Authority (FINMA) has recently published guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs). This new regulatory framework will form the basis of this legal analysis but some relevant legal aspects in connection therewith shall also be addressed in order to have a broader understanding of the legal and regulatory environment in Switzerland.

Introduction

As digitalisation may have a disruptive impact on traditional industries and business models, "blockchain", "decentralised autonomous organisations", "fintech", "smart contracts", "initial coin offerings", "virtual and cryptocurrencies" have become common terms when assessing the future challenges.[1] The blockchain technology and cryptocurrencies represent technological developments which are considered to have an impact on the financial industry and, therefore, attract the attention of industry and regulators as well as legislators.

Switzerland, as a major financial player, is particularly exposed to these challenging developments—the financial centre's contribution representing 9.1% of the country's GDP.[2] While some countries appear to be reluctant to act, Switzerland encourages innovation and competitiveness in its financial marketplace and considers itself a "crypto nation".[3] Besides the entry into force of new fintech rules in 2017,[4] reducing market entry barriers and easing the regulatory burden, FINMA has also been enhancing the regulatory framework and has since recognised the importance of technological progress for the financial sector as a whole.[5]

More recently, on 16 February 2018, FINMA published guidelines for enquiries regarding the regulatory framework for ICOs,[6] complementing the earlier *Guidance 04/2017*, published on 29 September 2017.[7] This new regulatory framework will form the basis of this legal analysis but a preliminary look at some of the relevant legal aspects in connection therewith may prove helpful in order to have a broader understanding of the legal and regulatory environment in Switzerland.

Legal aspects of cryptocurrencies under Swiss law

In ICOs, investors transfer funds, usually in the form of cryptocurrencies,[8] to the organiser of such ICOs. In return, they receive a specified quantity of blockchain-based coins or tokens, which are created and stored in a decentralised form either on a blockchain, which was created for the respective ICO, or through a smart contract on a pre-existing blockchain.[9] Hence, before the regulatory requirements for ICOs can be addressed, some general Swiss legal aspects on cryptocurrencies shall be discussed.

Do cryptocurrencies qualify as legal tender?

Cryptocurrencies, such as Bitcoin, are usually described as a virtual currency, which may be used for the purchase of goods and services. The use of cryptocurrencies as a payment method is not controlled by any government.[10]

* Responsibility for the information and views set out in this legal analysis lies entirely with the author, they do not necessarily reflect the position of BNP Paribas (Suisse) SA and/or the BNP Paribas Group.
[1] V. Tiberius and C. Rasche (eds), *FinTechs, Disruptive Geschäftsmodelle im Finanzsektor* (Berlin: Springer, 2017), pp.1, 105–109.
[2] Federal Department of Finance (FDF), State Secretariat for International Finance (SIF), "Key Figures" (Swiss financial centre, April 2018), p.2.
[3] Forbes, "China Isn't Helping Blockchain, or Bitcoin" (30 March 2018) available at: *https://www.forbes.com/sites/kenrapoza/2018/03/30/china-isnt-helping-blockchain-or-bitcoin/#ec0b8ec5c9e3*; "'Crypto nation' Switzerland issues guidelines to support market" (16 February 2018), *Financial Times* available at: *https://www.ft.com/content/737b9634-1303-11e8-8cb6-b9ccc4c4dbbb*; "'Crypto Nation': Switzerland Embraces Cryptocurrencies as an ICO Haven" (31 January 2018), *CNN.com* available at: *https://www.ccn.com/alpine-country-strives-for-crypto-nation/* [All accessed 2 July 2018].
[4] Federal Council, "Federal Council puts new fintech rules into force" (2017) available at: *https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-67436.html* [Accessed 2 July 2018].
[5] FINMA, "Technological change and innovation in the financial sector" (2015) available at: *https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/20150910-vortrag-fintech-bnm.pdf?la=en* [Accessed 2 July 2018].
[6] FINMA, *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)* (16 February 2018) available at: *https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?la=en* [Accessed 2 July 2018].
[7] FINMA, *FINMA Guidance 04/2017: Regulatory treatment of initial coin offerings* (29 September 2017) available at: *https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/4dokumentation/finma-aufsichtsmitteilungen/20170929-finma-aufsichtsmitteilung-04-2017.pdf?la=en* [Accessed 2 July 2018].
[8] The terms "virtual currency" and "cryptocurrency" are apparently used synonymously. In Switzerland, the term "cryptocurrency" is predominantly used for Bitcoin and the like, whereas the 5th Anti-Money Laundering Directive or AMLD5 (Directive 2018/843 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138 and 2013/36 [2018] OJ L156/43) uses the term "virtual currency". See also L. Müller, M. Reutlinger and P.J.A. Kaiser, "Entwicklungen in der Regulierung von virtuellen Währungen in der Schweiz und der Europäischen Union" [2018] *Zeitschrift für Europarecht*, EuZ 80, 96.
[9] FINMA, *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)* (2018).
[10] Müller, Reutlinger and Kaiser, "Entwicklungen in der Regulierung von virtuellen Währungen in der Schweiz und der Europäischen Union" [2018] *Zeitschrift für Europarecht*, EuZ 80, 86.

Also, cryptocurrencies are not based on any legal tender or material counterparts, such as e-money.[11] Hence, it is up to the market participants and users to decide whether any required financial market authorisation requirements are met. According to art.2 of the Federal Act on Currency and Payment Instruments 1999 (CPIA), the following payment instruments are considered to be legal tender:

- the coins issued by the Swiss Confederation;
- the banknotes issued by the Swiss National Bank; and
- Swiss franc sight deposits at the Swiss National Bank, whereby there is an obligation to accept such regular issue coins in payment according to art.3 of the CPIA.

Cryptocurrencies clearly do not fall under this definition and do not represent any legal tender.

Contrary to the definition of "legal tender", the question whether cryptocurrencies would qualify as "money" is not only a legal one. Money is any item or verifiable record that is generally accepted as payment for goods and services as well as repayment of debts in a particular country or socio-economic context.[12] While, at least from a rather (socio-)economic point of view, the criterion of general acceptance might be contested in the case of cryptocurrencies, it remains to be seen on a case-by-case basis whether and under which circumstances they would be acceptable in the context of the fulfilment of contractual payment obligations.

Cryptocurrencies under civil law

In their ideal manifestation, virtual currencies or tokens represent non-duplicable digitised rights that are managed on a decentralised database and are unchangeable and unauthorised.[13] Therefore, the general actual requirements in order to be protected as an absolute right might be met a priori. However, based on a well-accepted general Swiss legal understanding, an object—or "thing"—is a material, distinct from other objects, tangible item which can be controlled in legal and actual terms.[14] Based on this traditional concept, personal rights, assets, energy, aggregation of things or rights are excluded from being considered an object.[15] However, this narrow legal definition of an "object" has been extended through the decades and includes today, inter alia, rights recorded in the land register, forces of nature that may be subject to legal rights and which do not form part of any immovable property, usufruct held over rights or assets, pledges over claims or other rights or some subjective rights.[16] More recently, some legal scholars have argued that the term "object" and the Swiss concept of ownership are sufficiently flexible to also include new technical developments, e.g. regarding digital data, and that both requirements of tangibility and control are fulfilled.[17]

While the legal definition of an "object" has evolved, and therewith the ownership and transfer of such objects, cryptocurrencies as such have not been subsumed under said term unanimously. Cryptocurrencies might be viewed as digital data, which based on a modern interpretation of the term could be seen as an object. However, the decentralised structure of cryptocurrencies challenges the requirement of tangibility. Nevertheless, and since the value and transfer of cryptocurrencies, e.g. Bitcoin, is only valid if each transfer is confirmed on the blockchain, and thus requiring a chronological, permanent and transparent recording of transactions simultaneously in different places around the world, some scholars tend to accept that, from a functional perspective, cryptocurrencies do fulfil the requirements of tangibility and full control according to art.641 of the Swiss Civil Code (SCC),[18] while others are of the clear and probably predominant view that these requirements are not met.[19] Until a final decision of the Swiss Federal Supreme Court has been rendered, this question will remain disputed, regardless of its practical impact (e.g. segregation in case of bankruptcy), which is why the introduction *de lege ferenda* of data ownership into the law is unanimously welcomed and requested.

Cryptocurrencies under corporate law

According to Swiss corporate law, limited companies, such as limited liability companies (GmbH) or corporations (AG), may be incorporated by way of a cash contribution, which according to art.633 of the Swiss Code of Obligations (CO) needs to be deposited with an institution subject to the Federal Act on Banks and Savings Banks 1934 for the exclusive use of the company or by way of a contribution in kind in the sense of art.628 of the CO. Contributions in kind satisfy the contribution requirement only if, according to art.634 of the CO:

- they are made on the basis of an agreement to make a contribution in kind done in writing as a public deed;

[11] Federal Council, *Federal Council report on virtual currencies in response to the Schwaab (13.3687) and Weibel (13.4070) postulates* (25 June 2014), p.8 available at: *http://www.news.admin.ch/NSBSubscriber/message/attachments/35355.pdf* [Accessed 3 July 2018].
[12] Frederic S. Mishkin, *The Economics of Money, Banking, and Financial Markets*, alternate edn (Boston: Addison Wesley, 2007), p.8.
[13] M. Hess and P. Spielmann, "Cryptocurrencies, Blockchain, Handelsplätze & Co.—Digitalisierte Werte unter Schweizer Recht" in Vortrag von Dr Martin Hess gehalten am 23 November 2016 am Europa Institut an der Universität Zürich anlässlich des Seminars, "Kapitalmarkt—Recht und Transaktionen XII" (Zürich: Schulthess Verlag, 2017), pp.7–19.
[14] W. Wiegand, BSK ZGB II-Wiegand (Note 6) Vor art.641 No.6 (2015).
[15] B. Graham-Siegenthaler and A. Furrer, "The Position of Blockchain, Technology and Bitcoin in Swiss Law", *Jusletter*, 8 May 2017, p.13.
[16] Graham-Siegenthaler and Furrer, "The Position of Blockchain, Technology and Bitcoin in Swiss Law", 8 May 2017, p.14.
[17] M. Eckert, *Digitale Daten als Wirtschaftsgut: Digitale Daten als Sache* (Zürich: SJZ, 2016), p.245.
[18] Graham-Siegenthaler and Furrer, "The Position of Blockchain, Technology and Bitcoin in Swiss Law", 8 May 2017, p.19.
[19] B. Maurenbrecher and U. Meier, "Insolvenzrechtlicher Schutz der Nutzer virtueller Währungen", *Jusletter*, 4 December 2017, p.6.

- they are entered in the commercial register, the company immediately acquires ownership and the right to dispose of them or an unconditional right to enter them in the land register; and
- an incorporation report with audit confirmation is available.

In September 2017, the register of commerce of the Canton of Zug accepted the incorporation of a corporation (AG) by way of a contribution in kind of Bitcoin. This incorporation has subsequently been approved by the Federal Register of Commerce.[20] Previously, the register of commerce of the Canton of Schwyz already registered an intended acquisition in kind of a portfolio containing various cryptocurrencies.[21] Even though, according to current practice, the subscription payment may be done in freely convertible currencies such as the US dollar or the euro instead of Swiss francs, as formally foreseen in the CO, cryptocurrencies may in principle only be accepted as contribution in kind (in the case at hand, Bitcoin, as other cryptocurrencies are still to be tested), not just because capital payment accounts are not available in any cryptocurrency but also because the requirement of free conversion may not be met.[22]

FINMA's regulatory framework for initial coin offerings

General comments

FINMA published the *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)* on 16 February 2018, as a guidance paper setting out in broad terms its intentions for future regulatory practice in this area. FINMA also clarified its expectation enquiries concerning the application of Swiss financial market laws regarding specific ICO projects. These new guidelines rely on FINMA's earlier *Guidance 04/2017*, of 29 September 2017, where it was clarified that ICOs of Swiss issuers need to be scrutinised under the general principles of the Swiss financial market legislation. The relevant laws that may be applied are the banking legislation for any deposit-taking activity, the securities legislation for tokens classified as securities, the anti-money laundering legislation for any activity of a financial intermediary for anti-money laundering (AML) purposes and the collective investment schemes legislation for any fund management or related activity. The determination whether ICOs or other activities in connection with tokens or coins fall into the scope of such legislation may only be made on a case-by-case basis.[23] Enquiries may be submitted to FINMA by email and not only in one of Switzerland's official languages, i.e. German, French and Italian but also in English.

Token categories

Since there is no generally recognised categorisation of ICOs and the respective tokens resulting therefrom, neither in Switzerland nor internationally, FINMA created an independent way to classify the underlying economic function of tokens, in line with models used by leading practitioners. According to art.3.1 of the new guidelines, FINMA distinguishes the following token categories[24]:

- **payment tokens—**

  commonly also referred to as cryptocurrencies. These are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services or as means of money or value transfer. Cryptocurrencies do not give rise to any claims against the issuer;

- **utility tokens—**

  these are intended to provide digital access to an application or service by means of a blockchain-based infrastructure; and

- **asset tokens—**

  these represent assets such as a debt or equity claims against the respective issuer. Asset tokens promise, for example, a share in future company earnings or future capital flows. In terms of their economic function, these tokens may be deemed as equivalent to equities, bonds or derivatives. Tokens which enable physical assets to be traded on the blockchain also fall into this category.

Tokens may also take a hybrid form, including elements of more than one category. For the purpose of assessing the regulatory implications of a Swiss ICO, the very moment of the token issuance is relevant. However, FINMA acknowledged that the classification of a token may change over time.

Further to this categorisation, the new guidelines distinguish between tokens issued immediately in the context of an ICO fundraising on an existing blockchain and the mere promise to investors of a future token issuance and allocation, where such tokens or the underlying blockchain are still in development. This is referred to as "pre-financing". Pre-sale represents another

[20] Register of Commerce of the Canton of Zug, "HR Zug lässt Kryptowährungen als Sacheinlage zu" (2017) available at: *https://www.zg.ch/behoerden/volkswirtschaftsdirektion/handelsregisteramt/aktuell/bitcoin-als-sacheinlage* [Accessed 3 July 2018].
[21] L. Müller, T. Stoltz and T.A. Kallenbach, "Liberierung des Aktienkapitals mittels Kryptowährung—Eignen sich Bitcoins und andere Kryptowährungen zur Kapitalaufbringung?" [2017] (11) AJP/PJA 1318, 1319.
[22] Müller, Stoltz and Kallenbach, "Liberierung des Aktienkapitals mittels Kryptowährung" [2017] (11) AJP/PJA 1318, 1322.
[23] V. Müller and V. Mignon, "La qualification juridique des tokens: aspects réglementaires" [2017] (4) GesKR 487.
[24] Detailed listing based on the FINMA, *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)* (2018).

possible modification. In such cases, investors receive tokens which entitle them to acquire other different tokens at a later date.

Do tokens qualify as securities?

Article 3.2 of the new guidelines refers to the investor and market protection purposes of Swiss securities regulation and clarifies that FINMA is bound by the definition of securities in the Financial Market Infrastructure Act 2016 (FMIA). The definition includes, according to art.2(b) of the FMIA, certificated securities (*Wertpapiere*) or uncertificated securities (*Wertrechte*) as well as derivatives and intermediated securities that are standardised and suitable for mass trading, i.e. that they are publicly offered in a standardised structure and denomination or are placed with more than 20 clients, as long as they are not created specifically for individual counterparties according to art.2(1) of the FMIA.

Uncertificated securities are, according to FINMA, rights which, based on a common legal basis (e.g. articles of association or issuance conditions), are issued or established in large numbers and are generically identical. According to art.973c para.2 of the CO, the only formal requirement is to keep a book in which details of the number and denomination of the uncertificated securities issued and of the creditors are recorded. This may be accomplished digitally on a blockchain according to FINMA.

On this basis, FINMA's conclusion on the token categories, as detailed above, is as follows:

- **payment tokens—**

  since payment tokens are designed to be used as a means of payment, they are currently not qualified as securities. FINMA states, however, that it could revise its practice based on new case law or legislation;

- **utility tokens—**

  if the purpose of such tokens is to provide access rights to a digital platform or application and the utility tokens can be used in some form at the moment of their issuance, they do not constitute securities according to FINMA. However, if a utility token has in addition (or only) an investment purpose at the point of issue, FINMA would treat such tokens as securities, i.e. in the same way as asset tokens; and

- **asset tokens—**

  FINMA qualifies such tokens as securities within the meaning of art.2(b) of the FMIA.

Where the tokens of an ICO qualify as securities, the regulatory framework of the Stock Exchanges and Securities Trading Act 1999 (SESTA) would be applicable. The book-entry of self-issued uncertificated securities is essentially unregulated under the SESTA, even if the uncertificated securities qualify as securities within the meaning of the FMIA; this is also the case for the public offering of securities to third parties. However, the creation and issuance of derivative products as defined by the FMIA to the public on the primary market is regulated in line with art.3(3) of the Stock Exchange Ordinance (SESTO). It shall be noted that, according to art.3(2) of SESTO, the underwriting and offering tokens constituting securities of third parties publicly on the primary market constitute a licensed activity, if exercised in a professional capacity.[25]

Prospectus requirement

Regardless of the classification of tokens as securities, with respect to any tokens constituting a digital representation of rights that are exercisable against an issuer, the question arises whether such tokens are subject to a prospectus requirement. This would apply in the case of tokens where the rights being part of them are qualified as equity instruments or bonds. Then the issuer would need to prepare a prospectus pursuant to the CO.

Bank deposits and fund regulation

Since the issuance of tokens is not in general associated with a repayment obligation of the issuer, accepting thereby deposits from the public in the meaning of the Swiss Banking Act 2016 (BankA), such tokens would not fall within the definition of deposit according to BankA. In case of liabilities with debt capital character, however, e.g. promises to return capital with a guaranteed return, the funds raised would be treated as deposits which would in principle require a licence.[26]

Even though the Swiss collective investment schemes regulation is not addressed at large in the new guidelines, it is stated that the rules on collective investment schemes may apply if funds accepted in the context of an ICO are managed by third parties.

Applicability of and compliance with the Anti-Money Laundering Act

According to art.2(3)(b) of the Anti-Money Laundering Act (AMLA), anyone who provides payment services or who issues or manages a means of payment qualifies as

[25] See also art.3.3 of the FINMA, *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)* (2018).
[26] See also art.3.4 of the FINMA, *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)* (2018), p.3.

a financial intermediary subject to the AMLA[27] and must be affiliated with an authorised AML self-regulatory organisation or be directly supervised by FINMA for AML purposes. Within the new guidelines, FINMA clarifies that the issuance of payment tokens corresponds to an issuance of a means of payment subject to the AMLA, as long as the tokens may be technically transferred on a blockchain infrastructure, which may be the case at the time of the ICO or subsequently. The issuance of a utility token does not fall within the scope of application of the AMLA, as long as the main purpose is providing access rights to a non-financial blockchain application. However, the issuance of such tokens would still be subject to the provisions of the AMLA in the event that the utility token may be used as a means of payment outside the respective non-financial application or if a utility token provides in addition access to an application in the financial sector. ICOs of asset tokens are not considered an issuance of payment instruments by FINMA and are therefore in principle not subject to AML regulation.

Upcoming threat: recommendation of the Global Forum on Transparency and Exchange of Information for Tax Purposes

On 17 January 2018, the Federal Council launched the consultation on the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).[28] The bill provides, based on a peer review report on Switzerland by the Global Forum of 26 July 2016,[29] for the conversion of bearer shares into registered shares as well as a system of sanctions for breaches of duty. It also suggests, however, the creation of a new art.985g of the CO, which provides that individual companies with at least CHF 100,000 in annual sales revenues, partnerships, legal entities and branches of companies headquartered abroad are required to have an account with a Swiss bank subject to BankA. This requirement would, in the view of the Bitcoin Association Switzerland, threaten the very existence of crypto start-ups since apparently most Swiss banks refuse to enter into a business relationship with any entity related to cryptocurrencies or blockchain technology.[30] The Swiss corporate union also rejects this new requirement.[31] The Federal Council will now evaluate the results of the consultation and submit the final proposal to the Swiss Parliament.

Outlook and concluding observations

Beginning with the "crypto valley" in Zug, Switzerland shall emerge as a "crypto nation". Zug added Bitcoin as a means of paying city fees, the Swiss Federal Railways sells bitcoins at its ticket machines, the Crypto Valley Association[32] publishes an ICO Code of Conduct, Geneva publishes a guide in support of ICO project holders[33] and the Government as well as the regulator encourage innovation and competitiveness in the Swiss financial marketplace—whether this dynamic will slow down in view of potential setbacks remains to be seen. From a legal perspective at least, the various initiatives look promising and the discussion among legal scholars in order to update legal terms and principles is intense. It all looks like a sound basis for a dynamic development.

[27] Müller, Reutlinger and Kaiser, "Entwicklungen in der Regulierung von virtuellen Währungen in der Schweiz und der Europäischen Union" [2018] *Zeitschrift für Europarecht*, EuZ 80, 89.
[28] Federal Council, "Federal Council launches consultation on implementation of Global Forum's recommendations" (17 January 2018) available at: *https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-69518.html* [Accessed 26 July 2018].
[29] Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews, *Peer Review Report: Phase 2: Implementation of the Standard in Practice* (Switzerland: OECD, 2016) available at: *http://www.oecd.org/ctp/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-switzerland-2016-9789264258877-en.htm* [Accessed 26 July 2018].
[30] "Law change would kill Swiss crypto industry" (7 March 2018), *Swissinfo.ch* available at: *https://www.swissinfo.ch/eng/new-content-item/43569556* [Accessed 3 July 2018]; see also Müller, Reutlinger and Kaiser, "Entwicklungen in der Regulierung von virtuellen Währungen in der Schweiz und der Europäischen Union" [2018] *Zeitschrift für Europarecht*, EuZ 80, 92.
[31] Economiesuisse, "Stellungnahme zur Umsetzung der Empfehlung des Global Forum" (24 April 2018) available at: *https://www.economiesuisse.ch/en/node/45457* [Accessed 3 July 2018].
[32] As regards the Crypto Valley Association, see webpage available at: *https://cryptovalley.swiss/* [Accessed 3 July 2018].
[33] Directorate General for Economic Development, Research and Innovation, "World Premiere: Geneva publishes a guide in support of ICO project holders" available at: *http://www.whygeneva.ch/en/world-premiere-geneva-publishes-guide-support* [Accessed 3 July 2018].