



Switzerland: Cryptocurrency Regulation Updates

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Switzerland: Cryptocurrency Regulation Updates

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SUMMARY On December 14, 2018, the Swiss government published a comprehensive report titled the *Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland*. It addresses the legal treatment of cryptocurrencies, blockchain, distributed ledger technologies, and fintech under the current legal framework and highlights areas that require amendments in order to provide market participants with legal certainty. It focuses on civil law, insolvency law, financial market law, banking law, and combatting money laundering and terrorist financing. The report acknowledges that there is a selective need for new regulation to cover open questions, for example the treatment of cryptocurrencies. The Federal Council has tasked the Federal Department of Finance and the Federal Department of Justice and Police to draw up a consultation draft in the first quarter of 2019 to address these open questions.

I. Introduction

This report provides information on new developments on cryptocurrency regulation in Switzerland since the publication of the Law Library's June 2018 report entitled *Regulation of Cryptocurrency in Selected Jurisdictions*.¹

On December 14, 2018, the Swiss Federal Council, the Swiss government, published a comprehensive report titled the *Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland*.² The report is based on the work of the blockchain/ICO working group that was set up by the Swiss State Secretariat for International Finance (Staatssekretariat für internationale Finanzfragen, SIF) in January 2018.³ Furthermore, the report took into account the evaluation of a consultation with the fintech and financial industry as well as the recommendations of the Blockchain Taskforce, a private industry initiative.⁴

¹ LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY IN SELECTED JURISDICTIONS (JUNE 2018), <https://www.loc.gov/law/help/cryptocurrency/regulation-of-cryptocurrency.pdf>, archived at <http://perma.cc/8SYU-82AT>.

² FEDERAL COUNCIL, LEGAL FRAMEWORK FOR DISTRIBUTED LEDGER TECHNOLOGY AND BLOCKCHAIN IN SWITZERLAND – AN OVERVIEW WITH A FOCUS ON THE FINANCIAL SECTOR (Dec. 14, 2018) (Federal Council Report 2018), <https://www.news.admin.ch/newsd/message/attachments/55153.pdf>, archived at <http://perma.cc/Z4X7-7J82>.

³ *Id.* at 14; Press Release, Federal Council, Blockchain/ICO Working Group Established (Jan. 18, 2018), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-69539.html>, archived at <http://perma.cc/YD27-TR3Q>.

⁴ Federal Council Report 2018, *supra* note 2, at 14; WORKING GROUP BLOCKCHAIN/ICO, CONSULTATION ON THE WORK OF THE WORKING GROUP BLOCKCHAIN/ICO (Aug. 31, 2018), <https://www.news.admin.ch/newsd/message/attachments/53506.pdf>, archived at <http://perma.cc/36MV-VUGS>; BLOCKCHAIN TASKFORCE, STRENGTHENING THE BLOCKCHAIN IN SWITZERLAND. THE WHITE PAPER OF THE BLOCKCHAIN

The Federal Council report addresses the legal treatment of cryptocurrencies, blockchain, distributed ledger technologies (DLT), and fintech under the current legal framework and highlights areas that require amendments in order to provide market participants with legal certainty. It focuses on civil law, insolvency law, financial market law, banking law, and combatting money laundering and terrorist financing.⁵ The report acknowledges that there is a selective need for new regulation to cover open questions, for example the treatment of cryptocurrencies.⁶ The Federal Council has tasked the Federal Department of Finance (FDF) and the Federal Department of Justice and Police (FDJP) to draw up a consultation draft in the first quarter of 2019 to address these open questions.⁷

II. Applicability of Current Legal Framework

A. Civil Law

The report reiterates that tokens in the form of cryptocurrencies are classified as intangible assets under Swiss civil law.⁸ Civil law differentiates between tokens that represent a value such as cryptocurrencies and tokens that represent a right outside of the blockchain.⁹ The report concludes that as they are neither absolute nor relative rights, the law does not provide any specific requirements for their transfer and there is therefore no need to amend the civil law provisions.¹⁰ However, the Federal Council has tasked the FDF and the FDJP to include a proposal for the transfer of rights by means of digital registers in their consultation draft to improve legal certainty.¹¹

B. Insolvency and Bankruptcy Law

As cryptocurrencies are considered assets, they could potentially be seized in insolvency proceedings by the creditor of the person entitled to them, and subsequently be realized. Likewise, in bankruptcy proceedings, when assets are collected, realized, and distributed to the creditors, a realization of crypto assets is generally possible.¹² Most of the time, crypto assets are held by third-party wallet providers. If the wallet provider declares bankruptcy, it must be

TASKFORCE (Apr. 2018), <https://blockchainfederation.ch/wp-content/uploads/2018/10/Blockchain-Taskforce-White-Paper-English-Version1.pdf>, archived at <http://perma.cc/3JG2-EXSW>.

⁵ Federal Council Report 2018, *supra* note 2, at 14.

⁶ *Id.* at 45.

⁷ Press Release, Federal Council, Federal Council Wants to Further Improve Framework Conditions for Blockchain/DLT (Dec. 14, 2018), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-73398.html>, archived at <http://perma.cc/57PW-M5V8>.

⁸ Federal Council Report 2018, *supra* note 2, at 63.

⁹ *Id.* at 64.

¹⁰ *Id.*

¹¹ Press Release, Federal Council Wants to Further Improve Framework Conditions for Blockchain/DLT, *supra* note 7.

¹² Federal Council Report 2018, *supra* note 2, at 65.

determined whether crypto assets are included in the estate or whether they can be segregated. The report points out that there are currently no special provisions for the treatment of cryptocurrencies in bankruptcy proceedings, so that the general provisions of the Federal Act on Debt Enforcement and Bankruptcy Act (DEBA) apply.¹³ The Swiss Federal Supreme Court has held that segregation is only necessary when the bankruptcy estate has custody over the assets, meaning “exclusive actual power of disposal.”¹⁴ In addition, article 242, para. 3 of DEBA provides that there is no actual power of disposal in cases of shared custody. The report differentiates between the following cases for crypto assets:

- Third-party custody: Custodian has exclusive actual power of disposal over the crypto assets.
- No third-party custody: The private key to access the crypto assets is exclusively known to the client or known both to the client and the custodian, so that the client retains actual power of disposal.
- Multi-signature address: Access to the crypto assets requires several keys, so that the power of disposal is shared between the custodian and the client.¹⁵

The report concludes that crypto assets are only included in the bankruptcy estate and must be separated if the client has no access to the private key and therefore no custody.¹⁶ However, it is unclear whether they can be separated on the basis of article 242 DEBA as they are not physical “objects” as the text of article 242 explicitly provides. In order to achieve legal certainty, the Federal Council therefore suggests amending the relevant legal provisions to be able to segregate crypto assets.¹⁷ For that purpose, it is important how crypto assets are allocated by the third-party wallet provider to determine if they are more akin to a property law claim or a contractual claim due to “mixing.” If the client’s credit balance is assigned to a specific blockchain and registered directly on the blockchain, there will be no problem in assigning the crypto assets to an individual client. The report compares this to a deposit in a safe deposit box or securities account with a bank.¹⁸ If, on the other hand, the credit balances are no longer assigned to an individual blockchain, the clients only have a credit balance vis-à-vis the custodian. The individual balances are only recorded on the custodian’s ledger. The report compares this situation to a traditional bank that does not keep the money that it receives from its clients separate.¹⁹

¹³ *Id.* at 66; Bundesgesetz über Schuldbetreibung und Konkurs [SchKG] [Federal Act on Debt Enforcement and Bankruptcy] [DEBA], SYSTEMATISCHE RECHTSSAMMLUNG [SR] [SYSTEMATIC COLLECTION OF LAWS] 281.1, https://www.admin.ch/opc/de/classified-compilation/18890002/20190101_0000/281.1.pdf, archived at <http://perma.cc/RX3E-7JPD>.

¹⁴ BUNDESGERICHT [BGER] [FEDERAL SUPREME COURT], June 1, 1984, 110 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] [DECISIONS OF THE SWISS FEDERAL SUPREME COURT] III 87, 90, https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?highlight_docid=atf://110-III-87:de&lang=de&zoom=&type=show_document, archived at <http://perma.cc/D4CV-GDW2>.

¹⁵ Federal Council Report 2018, *supra* note 2, at 66.

¹⁶ *Id.* at 67.

¹⁷ *Id.* at 68, 69.

¹⁸ *Id.* at 69.

¹⁹ *Id.*

In addition to clarifying how crypto assets may be separated in bankruptcy proceedings, the report also proposes to determine whether the object of separation will be the crypto asset itself or the access key. However, the report states that this question might be left unanswered if “an additional legal provision were introduced to provide for the segregation of data to which the beneficiary is able to demonstrate a special entitlement.”²⁰ A parliamentary initiative to amend article 242 of DEBA to include the surrender of non-physical assets was endorsed by the Legal Affairs Committee of the Swiss National Council on May 3, 2018.²¹ The Federal Council would extend this claim to include all data and not just assets. In conclusion, the Federal Council will “propose a provision setting out a right to the surrender of data in the event of insolvency, including a claim to the transfer of crypto assets.”²²

C. Financial Market Law

The Federal Council in its report endorses FINMA’s classification of tokens issued in Initial Coin Offerings (ICOs) as asset, utility, or payment tokens.²³ It also points out that the existing definitions for securities and derivatives will not be changed for blockchain- and token-based applications.²⁴

However, for financial market infrastructures, it proposes an amendment to the Financial Market Infrastructure Act (FMIA) and the Financial Market Infrastructure Ordinance (FMIO), so that exceptions for blockchain and DLT may be granted in justified cases.²⁵ With regard to crypto-trading platforms, the report states that only decentralized trading platforms for tokens that qualify as securities require authorization from FINMA as a financial market infrastructure, whereas exchange platforms and distributed peer-to-peer platforms do not.²⁶ However, the

²⁰ *Id.* at 69.

²¹ *Id.* at 70; Parliamentary Initiative 17.410. Daten sind das höchste Gut privater Unternehmen. Datenherausgabe beim Konkurs von Providern regeln [Data are the Greatest Good of Private Companies. Regulating the Surrender of Data in the Event of Bankruptcy of Providers], <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20170410>, archived at <http://perma.cc/V62J-FZ5Y>.

²² Federal Council Report 2018, *supra* note 2, at 70.

²³ *Id.* at 83; FINMA, Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (FINMA ICO Guidelines) (Feb. 16, 2018), <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?la=en>, archived at <http://perma.cc/PV9L-5AEK>.

²⁴ Federal Council Report 2018, *supra* note 2, at 96.

²⁵ *Id.* at 97; Finanzmarktinfrastrukturgesetz [FinfraG] [Financial Market Infrastructure Act] [FMIA], June 19, 2015, SR 958.1, <https://www.admin.ch/opc/de/classified-compilation/20141779/201901010000/958.1.pdf>, archived at <http://perma.cc/17UR-3MD4>, unofficial English translation available at <https://www.admin.ch/opc/en/classified-compilation/20141779/201901010000/958.1.pdf>, archived at <http://perma.cc/NTU9-3XF2>; Finanzmarktinfrastrukturverordnung [FinfraV] [Financial Market Infrastructure Ordinance] [FMIO], Nov. 25, 2015, SR 958.11, <https://www.admin.ch/opc/de/classified-compilation/20152105/201901010000/958.11.pdf>, archived at <http://perma.cc/XC4B-3JUT>, unofficial English translation available at <https://www.admin.ch/opc/en/classified-compilation/20152105/201901010000/958.11.pdf>, archived at <http://perma.cc/3YST-3TQQ>.

²⁶ Federal Council Report 2018, *supra* note 2, at 99.

operation of a financial market infrastructure is currently limited to certain financial market institutions.²⁷ The Federal Council therefore proposes the creation of a new authorization category for the operation of a financial market infrastructure involving crypto-based assets by amending FMIA and FMIO.²⁸

Furthermore, the Federal Council proposes with respect to crypto funds to amend the Swiss Collective Investment Schemes Act (CISA) to permit a new fund category called “limited qualified investment funds” (L-QIF). The L-QIFs will require no authorization from FINMA, which means that they can be placed on the market faster.²⁹ In September 2018, the FDF was instructed to draw up a consultation paper in that regard.³⁰

D. Banking Law

In addition to exempting fintech firms that accept public funds up to a total value of CHF1 million (approximately US\$995,000) from the requirement to have a banking license (regulatory sandbox), since January 2019, a new fintech authorization category with simplified requirements has been included in the Banking Act.³¹ However, even though the new category is commonly referred to as “fintech license,” it is also available to non-fintech companies that meet the authorization requirements.³²

Companies that are granted the new fintech license may accept public funds of up to CHF 100 million (about US\$95.5 million) on a professional basis, but may not invest or pay interest on these funds.³³ This includes traditional currencies as well as cryptocurrencies.³⁴ Companies with that special license are subject to less restrictive requirements than banks—for example, they are not obligated to participate in the deposit protection regime, but must inform their clients accordingly.³⁵ Furthermore, unlike banks that have minimum capital requirements of CHF 10 million (about US\$9.9 million), companies with the new fintech license must only hold 3% of the

²⁷ *Id.* at 101.

²⁸ *Id.* at 108.

²⁹ *Id.* at 129.

³⁰ *Id.*

³¹ Federal Council Report 2018, *supra* note 2, at 89; Press Release, Federal Council, Federal Council Adopts Implementing Provisions for Fintech Authorization (Nov. 30, 2018), <https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-73186.html>, archived at <http://perma.cc/72FW-A3GW>; Bankengesetz [BankG] [Banking Act] [BankA], Nov. 8, 1934, SR 952.0, art. 1b, <https://www.admin.ch/opc/de/classified-compilation/19340083/201901010000/952.0.pdf>, archived at <http://perma.cc/XE8G-XARQ>.) The Banking Ordinance was amended accordingly. (Bankenverordnung [BankV] [Banking Ordinance] [BankO], Apr. 30, 2014, SR 952.02, <https://www.admin.ch/opc/de/classified-compilation/20131795/201901010000/952.02.pdf>, archived at <http://perma.cc/BZP5-696P>.)

³² Federal Council Report 2018, *supra* note 2, at 89, n.472.

³³ BankA, art. 1b.

³⁴ Federal Council Report 2018, *supra* note 2, at 89.)

³⁵ BankO, art. 7a, para. 1(b).

public funds received as capital, however, or at least CHF300,000 (about US\$ 298,500).³⁶ The report points out that if cryptocurrencies are held in custody for clients on the blockchain and can be attributed to individual clients at all times, they are not considered deposits within the meaning of the Banking Act and no banking or fintech license is required.³⁷

Furthermore, in light of the proposed amendment to the general insolvency law provisions, the Federal Council will look into a corresponding amendment of bank insolvency law provisions for the treatment of tokens and similar assets.³⁸

E. Anti-Money Laundering Legislation

The Federal Council reiterates that cryptocurrencies are qualified as virtual currencies, which are considered assets with regard to their tradability.³⁹ The Anti-Money Laundering Act (AMLA) is technology-neutral and therefore also applicable to crypto assets.⁴⁰ However, the Federal Council proposes to take the following steps to make the application of anti-money laundering legislation more explicit:

- It will set out in further detail and explicitly adopt into law the current FINMA practice whereby decentralised trading platforms with the power to dispose of third-party assets are subject to AMLA;
- It will set out in further detail and explicitly adopt into law the applicability of Article 2 paragraph 3 letter b AMLA to the issue of crypto-based means of payment;
- Switzerland will in future continue its efforts in international committees to actively promote an internationally coordinated and effective defence mechanism to combat the risks of money laundering and terrorist financing by means of international standards.⁴¹

³⁶ BankO, art. 15, para. 1, art. 17a, para. 1.

³⁷ Federal Council Report 2018, *supra*, at 89; FINMA, FACT SHEET. VIRTUAL CURRENCIES (Jan. 1, 2019), at 2, <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-virtuelle-waehrungen.pdf?la=en>, archived at <http://perma.cc/M9QR-S9AC>.

³⁸ Federal Council Report 2018, *supra* note 2, at 90.

³⁹ *Id.* at 131.

⁴⁰ *Id.* at 140; Geldwäschereigesetz [GwG] [Anti-Money Laundering Act] [AMLA], Oct. 10, 1997, SR 955.0, <https://www.admin.ch/opc/de/classified-compilation/19970427/201901010000/955.0.pdf>, archived at <http://perma.cc/8T2R-EKWT>, unofficial English translation available at <https://www.admin.ch/opc/en/classified-compilation/19970427/201901010000/955.0.pdf>, archived at <http://perma.cc/Z8DT-N2CL>.

⁴¹ Federal Council Report 2018, *supra*, at 142.