Report on the current Swiss regulatory framework regarding Distributed Ledger Technology (DLT)

Staatssekretariat für Internationale Finanzfragen, SIF

Bern

Geneva, 10th of April 2023

Dear Madam, Dear Sir,

Please find hereby our report regarding the current DLT framework and our improvement proposal.

Best regards,

Gabriel Jaccard, CEO Arbitri

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Introduction

Switzerland is at a **turning point** vis-à-vis its role as an innovative leader.

We benefit from our country's **past era** of economic glory, but wisdom teaches us the utmost caution whenever contemplating the times to come. The world is changing at a speedy pace, and the probability for Switzerland to maintain its status, privileges, and role in a shifting world is uncertain.

Technologies have become a foundational building block of our modern society. In particular, blockchain's proposition value should play a special role for Switzerland as it envisions to constitute the technical embodiment of an important social value : **trust**.

Currently, statistics show us that the number of blockchain projects being developed on Swiss soil is in progression. However, most indicators indicate that Switzerland's market share is **still small** and rather plays a marginal role, nor count many of the main service providers. The reason lies in the practical harshness of our current regulation.

The present contribution proposes to equip Switzerland with **appropriate legal framework** enabling the concrete flourishing of the trust industry. In order to operate that, the regulation shall be simple and should focus on enabling practical use cases to become concretely possible, hence taking a functional approach.

Our report is built upon concrete applications and solutions and proposes legislative modifications in the existing legal framework.

1. Application: STO

1.1. Overview Digital Share

The introduction of shares in the form of ledger-based securities ("**digital shares**"), played a pivotal role in the creation of the DLT Act, considering the significant impact they could have on the Swiss economy. Digital shares enable corporations to digitize their entire internal structure, including shareholder rights, corporate actions, and share trading, leading to the creation of fully digital corporations. This technological innovation can provide Swiss corporations with substantial benefits. Additionally, digital shares provide SMEs and startups with access to the capital market, which was previously out of reach for them, giving Switzerland a competitive edge over other economies. Through the issuance of digital shares against the payment of the issue price, companies can raise capital from the general public, and payments are usually made using crypto-based assets such as Ether or Bitcoin. This process, known as a Security Token Offering ("**STO**"), removes the need for financial intermediaries and allows many firms to raise capital from the capital market. In contrast, today only a limited number of companies, approximately 250, are listed on the stock exchange due to the high barriers to entry.

The DLT Act aimed to establish Switzerland as a global leader in Security Token Offerings, building on its prior success with Initial Coin Offerings (ICOs). However, Switzerland has experienced limited STO activity to date. To unlock the full potential of STOs, minor amendments to Swiss law are required.

1.2. Money Contribution by Stablecoins

1.2.1. Problem

To establish STOs as a viable new source of financing for corporations, a reliable and widely accepted stablecoin is required. Pure cryptocurrencies are perceived as high-risk assets and are not suitable for the settlement of capital market transactions, whereas stablecoins provide the required stability. Hence, the need for legal clarification in regards to stablecoins. In addition, the contribution of a stablecoin must be possible according to the rules of a money contribution (*Barliberierung; libération en espèces*). It is impractical to conduct large capital market transactions under the rules of contributions in kind (*Sachliberierung; liberation en apport en nature*).

According to art. 633 al.3 CO, an asset can be used for a money contribution if it meets two requirements. First, it must qualify as a money contribution (*Einlage in Geld; apport en espèces*). Second, the asset must have a denomination in a currency as provided for by the law. While there is some disagreement in the doctrine, in our opinion stablecoins can be used for a money contribution if they qualify as money in the broader sense (*Geld im weiteren Sinn*).

1.2.2. Solution

Because of the existing legal uncertainty, banks are reluctant to accept stablecoins as a money contribution. To promote the growth of STOs and provide corporations with access to

the capital market, stablecoins should be explicitly allowed under Swiss law for a money contribution. A minor amendment to Art. 633 CO that replaces "deposit" (*Einzahlung; versements*) with the broader term "contribution" (*Einlage; apport*) would provide the necessary legal clarification. In addition, the materials should clarify that stablecoins qualify as contributions in the sense of art. 633 CO, provided that they qualify as money in the broader sense.

Art. 633 CO could be amended as follows:

> **Art. 633 Einlagen in Geld**
>
> [...]
>
> 3 Als Einlagen in Geld gelten Einlagen in der Währung, auf die das Aktienkapital lautet, sowie Einlagen in anderen zum Aktienkapital frei konvertierbaren Währungen.

1.3. Form Requirements

1.3.1. Problem

Another obstacle for STOs are various form requirements for the issuance process. One such requirement is the subscription form (*Zeichnungsschein; bulletin de souscription*), which, according to art. 652 CO, must be in simple written form. However, this formality poses a challenge for digital shares as fulfilling the simple written form requirement on a distributed ledger is not practical. This means that the subscription form has to be signed outside the securities-ledger, depriving the STO process of one of its major advantages.

We strongly believe that the form requirement for the subscription form should be eliminated. There is no apparent reason for a subscription form to adhere to a specific form. This is further supported by the fact that the latest corporate law revision eliminated the written form requirement for the exercise of conversion rights in case of a conditional capital, as it was deemed outdated.[1] Additionally, the subscription form does not serve as an official document for the commercial registry (*Handelsregisterbeleg; pièce justificative du registre du commerce*).

1.3.2. Solution

Therefore, removing the form requirements for the subscription form would simplify the STO process and eliminate unnecessary complications.

Hence art. 652 could be amended as follows:

> **Art. 652**
>
> 1 Die Aktien werden in einer besonderen Urkunde (Zeichnungsschein) nach den für die Gründung geltenden Regeln gezeichnet.

[1] Dispatch of the Federal Council on the Amendment of the Code of Obligations of 23 November 2016, BBl 2017, 319 et seq., 503

1bis Der Zeichnungsschein kann in einer beliebigen Form erfolgen, die den Nachweis durch Text ermöglicht.

[...]

1.4. Identity of the Contributor in the Articles of Association

1.4.1. Problem

The current provision of art. 634 al.4 CO requires that in case of a contribution in kind, the name of the contributor and the shares allocated to him or her must be indicated in the articles of association, which poses a significant challenge for contributions in kind for crypto-based assets. The commercial register entry and the articles of association reveal the identity of the contributor and the fact that the crypto-based asset was transferred to the corporation. If the securities-ledger is public, these pieces of information could potentially be used to link a specific person to an address on the respective ledger. If the contributor has other addresses and transactions have taken place between these addresses in the past, they too could potentially be affected by the loss of anonymity. The result is an undesired loss of anonymity with respect to the address(es) of the contributors in question.

This provision has been criticized in the doctrine on numerous occasions for being ineffective and useless. Especially in connection with the contribution of crypto-based assets, it has a very unfavorable effect. As a result, corporations have resorted to raising capital through the sale of their treasury shares, which is not a desirable alternative. To address this issue, it is necessary to remove the transparency requirement and amend article 634 al.4 CO accordingly. This amendment should eliminate the disclosure of the contributor's name and the shares allocated to him or her, while still requiring sufficient documentation to confirm the contribution and its valuation. This change will ensure that the anonymity of the contributors is preserved, while also providing a clear legal basis for contributions in kind of crypto-based assets.

1.4.2. Solution

Hence art. 634 al. 4 CO should be amended as follows:

Art. 634 Sacheinlagen

[...]

4 Die Statuten müssen den Gegenstand, dessen Bewertung, die dafür ausgegebenen Aktien sowie allfällige weitere Gegenleistungen der Gesellschaft angeben. Die Generalversammlung kann die Statutenbestimmungen nach zehn Jahren aufheben.

2. Application: Trading of Digital Shares

2.1. Overview Secondary market

The digital share holds significant potential for the national economy by enabling trading of shares on automated trading systems for a wide number of corporations. Currently, automated trading of shares can only take place on a stock exchange, which limits it to around 250 corporations. The unique technical features of digital shares offer the possibility of automated trading outside of a stock exchange, opening up the possibility for small companies to establish such a trade for their shares. This potential is highly desirable for the national economy as it enables SMEs to get access to the capital market. However, there are currently several legal obstacles that make it challenging to realize this potential.

2.2. Transfer Restrictions

2.2.1. Problem

The transfer of digital shares that are not traded on a stock exchange, as defined by the Financial Market Infrastructure Act (FinfraG; LIMF), is subject to the share transfer restrictions for unlisted shares under art. 685b et seq. CO. These regulations require the consent of the company for the transfer of share ownership. The company has up to three months to decide whether to agree on the transfer (art. 685c para. 3 CO). However, in the case of automated trading of digital shares, such a long delay for transferring title ownership is unacceptable. Additionally, if the company rejects the acquirer, the shares must be retransferred. Because the seller and the acquirer of the digital share only face each other pseudo-anonymously or do not know each other at all, a retransfer of the digital share is often not possible. This makes it impossible to trade digital shares with transfer restrictions on an automated trading system.

2.2.2. Solution

To enable trading of digital shares via automated trading systems, it is necessary to ensure that the ownership in a share is immediately transferred to the acquirer without the company's consent, and that trades are valid according to the rules of the trading facility and irreversible. The share transfer restriction regime for listed shares provides a suitable solution for this. Therefore, corporations should be allowed to declare this regime of unlisted shares as applicable in their articles of association even if the shares of the corporation are not traded on a stock exchange.

Such a clarification could be as follows:

> **Art. 685b Voraussetzungen der Ablehnung**
> [...]
>
> 8 Aktiengesellschaften können in ihren Statuten vorsehen, die Regeln für börsenkotierte Namenaktien vollständig auf ihre Aktien anzuwenden.

2.3. Off-Chain Transfers

2.3.1. Problem

Art. 973d al.1 n°2 CO foresees that “A ledger-based security is a right which, in accordance with an agreement between the parties: may be exercised and transferred to others only via this securities ledger.”. Whereas art. 973f al.1 foresees that “ The transfer of the ledger-based security is subject to the provisions of the registration agreement.”

In our view, the wording lacks clarity regarding the hypothesis of so-called “**off-chain transfer**”, i.e. when the private key is transferred via the transfer of ownership (property) of a physical object (e.g. paper wallet) without corresponding changes on the blockchain (on-chain ; i.e. DLT securities are nominative title)[2]. In this hypothesis, the rights in presence may be summarized as : a) titularity over the DLT securities right (973d CO) / b) Possession (919 CC) over the object / c) Ownership (641 CC) over the object.

We believe that the text of 973d al.1 requiring an on-chain transfer is problematic as it is too stringent. Indeed, first the parties (via art. 973f al.1 CO) might be keen to allow for off-chain transfer to be valid. Second because the transfer of the physical object containing the private key stays factually possible and the possessor would be factually in control of the embedded DLT securities even when this person is not entitled (discrepancies between property rights and securitization rights). Hence, we propose a modification of art. 973d CO to allow the issuer to clarify in its registration agreement whether off-chain transfers are allowed..

2.3.2. Solution

Art. 973d CO

al.1 n°2 :
Est droit-valeur inscrit tout droit présentant les caractéristiques suivantes par convention entre les parties:

il n’est possible de le faire valoir que par ce registre,

2.4. Central Securities Depository

2.4.1. Problem

The regulatory landscape regarding the issuance of digital shares remains uncertain, particularly with regards to the role of service providers and platforms involved in the issuance process. Informally, FINMA has taken the position that issuing tokens on securities-ledgers may require authorization as a central securities depository (“**CSD**”) under the Financial Market Infrastructure Act (FinMIA; FinfraG; LIMF).

However, the issuance and transfer of a digital share is fundamentally different from the intermediated securities system and does not require a CSD. The role of a CSD is closely

[2] The new owner being in a situation of owner and possessor (641/919 CC), eventually in co-ownership (646 CC) with the transferor or a third-party.

tied to the intermediated securities system, and was created to streamline the transfer of physical securities (Wertpapiere; Papier-Valeur). To avoid the need for physical transfer at every transaction, shares were no longer held separately at each bank but centrally at a CSD. The CSD maintained a record of all participants' assets and ultimately managed all investors' assets. However, this system comes with the risk of incorrect accounting and potential manipulation by the CSD, making it necessary for a license to perform the role of a CSD under the law.

This is fundamentally different from ledger-based securities, which were created to enable electronic representation and transfer of rights without the need for a central intermediary and outside the intermediated securities system. Instead, the technological properties of the securities-ledger justify a correct bookkeeping. The DLT Act defines the technological properties of securities-ledgers in art. 973d al.2 CO in such a way that no trustworthy intermediary is required. The legislator has even gone so far as to explicitly exclude a third party's power of disposal over the ledger-based security in art. 973d al.2 CO. According to the Dispatch, this characteristic allows the differentiation from purely centrally managed registers, which are already covered by the intermediated securities system.[3]

2.4.2. Solution

Requiring CSD authorization for the issuance of digital shares undermines the DLT Act and contradicts the requirement of the power of disposal. To reduce regulatory uncertainty and promote innovative financial instruments, it is crucial to clarify that CSD authorization is not required for issuing ledger-based securities under the Financial Market Infrastructure Act.

One such solution could be to clarify that service providers enabling parties to issue tokens (qualifying as financial instrument and/or security; unrelated to whether in the form of art. 973d et seq. CO) shall not be subject to art. 61 FinMIA, if i) they do not have direct or indirect control over the issued tokens, ii) a public permissionless chain is used, and iii) if all transfers and settlements are settled peer-to-peer.

[3] Dispatch of the Federal Council on the Amendment of Federal Law with respect to Developments in the Technology of Distributed Electronic Ledgers of 27 November 2019, BBl 2020 233, 278.

3. Application: Tokens

3.1. Regulatory Qualification of Utility Tokens

3.1.1. Problem

The notion of utility token was described in the FINMA's ICO guidelines[4] as "tokens which are intended to provide digital access to an application or service. [...] These tokens do not qualify as securities if their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used in this way at the point of issue. If a utility token functions solely or partially as an investment in economic terms, FINMA will treat such tokens as securities (i.e. in the same way as asset tokens)".

The lack of clarity in the definition gives FINMA considerable leeway to reclassify tokens as they see fit. Further, the question of whether an actual right is embedded in the token and its nature under civil law is made unclear. Indeed, one cannot exclude for instance that tokens might simply represent contractual titles within a contractual relationship without embedding rights (hypothesis of art. 965 CO), like it is the case for a train ticket in the context of a transportation contract. In this latter example, some leeway should exist to insure that tokens are not to be considered as securities. Further, the financial authority's view should consider that utility tokens are a form of digitalized goods and services falling outside its competence.

The criteria set to reclassify tokens are also problematic as they seem incompatible with civil law. First, the notion of investment contract is deemed to be met in the hypothesis of a pre-sale, a pre-financing (beta platform), or when the token does not exist at the time of the sale. The notion of investment is met when the token is expected to deliver a return or an increase in value.

Those criteria appear vague and subjective. Our criticism lies in the fact that, from an economics point of view, any purchase/sale might be considered as some kind of investment/income resulting from an investment; hence have a likelihood to be requalified by the financial regulator. Further, many contracts can be deemed "financial contracts" depending on their context (sale, deposit, loan). In addition, it is usual for goods and services to be bought in advance, and delivered at a later date in the future, or even subjectively constitutes an investment in the consumer's view (for instance the purchase of a painting or a Rolex). Furthermore, the mere fact that a token is meant to serve as a title to obtain some goods and services that might increase in value should not be the criteria to qualify those as falling under the realm of the financial markets, in a few words: **Tulips are not securities**. This leads to regulatory uncertainties. In particular, the notion of financial contract and investment should be clearly determined within a federal ordinance.

In our view, there is a need to draw a clear line between financial law use cases and purely contractual use cases relating to consumer law or that would not embed securities.

3.1.2. Solution

We propose the introduction of art. 2 OMIA

[4] https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/

5. Ne sont pas considérées comme des valeurs mobilières :
   a) Les titres représentants des oeuvres d'arts au sens de la LDA, ainsi que les droits contractuels et de propriétés intellectuelle qui en découlent ;
   b) Les titres permettant à leur détenteur de prouver leur titularité à un rapport contractuel lorsqu'il ne se déroule pas dans un contexte financier prépondérant. Le Conseil fédéral détermine les critères d'un contexte financier prépondérant;
   c) Les titres représentants un bien ou un service dont la nature le rend propre à être consommé en vue de l'obtention du service;
   d) Les titres visant à prouver l'existence d'un droit réel;
   e) Les titres en prévente qu'ils existent ou non au moment de la vente lorsqu'il ne se déroule pas dans un contexte financier prépondérant:
   f) Les titres dont le sous-jacent est dans un ratio un pour un avec une monnaie ayant cours légal.
   g) Les titres ayant pour unique but de conférer des droits sociaux dans le cadre associatif ou d'un groupe n'étant pas organisé sous l'égide d'une société corporative.

We propose the introduction of art. 3 al. 1 Ch.8 FINSA

8. Ne sont pas considérées comme des instruments financiers :
   a) Les titres représentants des oeuvres d'arts au sens de la LDA, ainsi que les droits contractuels et de propriétés intellectuelle qui en découlent ;
   b) Les titres permettant à leur détenteur de prouver leur titularité à un rapport contractuel lorsqu'il ne se déroule pas dans un contexte financier prépondérant. Le Conseil fédéral détermine les critères d'un contexte financier prépondérant;
   c) Les titres représentants un bien ou un service dont la nature le rend propre à être consommé en vue de l'obtention du service;
   d) Les titres visant à prouver l'existence d'un droit réel;
   e) Les titres en prévente qu'ils existent ou non au moment de la vente lorsqu'il ne se déroule pas dans un contexte financier prépondérant:
   f) Les titres dont le sous-jacent est dans un ratio un pour un avec une monnaie ayant cours légal.
   g) Les titres ayant pour unique but de conférer des droits sociaux dans le cadre associatif ou d'un groupe n'étant pas organisé sous l'égide d'une société corporative.

3.2. DLT securities representing property rights (641 / 919 CC)

3.2.1. Problem

The current regulatory framework does not permit (rightfully in our opinion) to issue tokens embedding direct ownership rights over things or real estate (641 / 919 CC)[5]. FINMA acknowledges that such a possibility exists and that such a token would be qualified as a security in the ICO guideline by stating that "La catégorie des jetons d'investissement peut

[5] Foreign regulatory framework enables it for instance (https://www.gesetze.li/konso/2019301000), which poses problems regarding international private law (law applying to the transfer of the thing).

également inclure des jetons destinés à rendre des objets physiques de valeur négociables sur la blockchain." Further, the Stablecoin guideline expressly mentions the possibility to issue a title of proof - hence not qualifying as a security - for the existence of an ownership right (for instance for tokens representing property right over precious metal)[6].

In our view, this situation constitutes a problem as the use case regarding the possibility of tokenization over property rights are limited and made unclear.

3.2.2. Solution

I. Droits-valeurs inscrits sur un droit réel

973j

1. Le titulaire d'un droit réel, notamment une chose mobilière ou immobilière, peut représenter son droit au travers de la constitution d'un droit valeur-inscrit portant sur son droit réel. Le droit réel constitué est alors réputé exister vis-à-vis de l'acquéreur du droit-valeur inscrit auquel la chose est reliée.
2. Le titulaire du droit réel et la personne de l'acquéreur du droit-valeur inscrit doivent correspondre en tout temps.
3. Le transfert de la titularité du droit-valeur inscrit équivaut à la remise d'un moyen de puissance sur la chose et une notification au déposant.
4. Le droit-valeur inscrit sur un droit réel est régi par les art. 973d ss CO qui s'appliquent *mutatis mutandis*.

3.3. General Civil Law Qualification of Tokens

3.3.1. Problem

Whereas the legal status of ledger-based securities has become relatively clear, the private law qualification of non-security-tokens, and cryptocurrencies in general, has remained highly unclear. This relates to the type and modality of a transfer, ownership regulations such as joint and total ownership or independent and dependent ownership, the initial creation of a right of disposal, the application of causality or abstraction principles, the possibility of an acquisition in good faith, the use of such tokens as collateral in form of a pledge, and even various reflex effects in the areas of tort law, criminal law and inheritance law.

Germany, after having introduced a full *Sachfiktion* for blockchain-based securities in its Act on Electronic Securities (eWpG), has recognized the inconsistency of having clear rules for tokens qualifying as securities on the one side, and treating all other tokens as objects *extra legem* from a civil law perspective on the other. Therefore, there currently is a major legislative process ongoing to change the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) outside of securities law to make certain property law provisions applicable to any type

[6] This statement is paradoxical as the title of proof represents a proof of the property right, which must irremediably be transferred alongside in case of transfer the property (i.e. literally the definition of art. 965 CO).

of crypto asset, such as the acquisition in good faith, on tokens in general. Liechtenstein is already applying various provisions in its TVTG (including also good faith acquisition, but also pledges and other means of securities) to any type of token.

3.3.2. Solution

We strongly suggest initiating respective steps to increase the legal certainty also for other forms of crypto assets, which - in contrast to ledger-based securities - have a current market valuation of over 1 trillion US dollars and are very significant assets in circulation.

4. Application: A Stablecoin Economy based upon the CHF

4.1. Problem

The crypto market as a whole is heavily relying on USD as a currency and USD related stablecoins such as USDC or USDT. As a matter of fact, the U.S. authorities play a prominent role in the crypto market and could - as have previously - claimed jurisdiction based on a mere existing link with USD. Consequently, most projects using those are subject to this risk, which also diminishes our sovereignty. Furthermore, we note CHF stablecoins are currently being created abroad[7].

The Swiss regulatory framework[8] enables the creation of stablecoins but only under (very) strict conditions, which makes it absolutely economically impracticable and creates an inequality of treatment compare to other existing local currencies[9] or the WIR[10]. In particular, we refer hereby to the argument discussed by the Swiss Blockchain Federation's report regarding the capital & liquidity adequacy requirements.

Furthermore, we believe that the current situation is paradoxical as the riskiest assets like volatile cryptocurrencies (e.g. BTC) do not require (or limited) supervision of the issuer (sale contract where the buyer bears the risk), whilst the safer option of purchasing a stablecoin with fixed redemption claim is made impractical. In addition, we note that banks benefit from the monetary creation process by lending to third-party and create leverage based upon the deposited funds, which is not necessarily the case to a project that would plan to issue a CHF based stablecoin.

4.2. Solution

We welcome the proposal of the Swiss Banking Association of introducing a "deposit token"[11]. We are convinced by two of the proposed models: the joint token and the standardized token, with a preference for the first one. In our view, however, those tokens should be deployed on an open and public blockchain (e.g. ETH).

In addition, we believe that the creation of stablecoins should not be limited to banks. More financial intermediaries should be allowed to create stablecoins to foster financial innovation. We recognize the high value of the integrity of the financial market, and hence propose two prerequisites for the issuance of stablecoins: first, only regulated issuers should be allowed to create stablecoins. Depending on the market capitalization of the stablecoin and the resulting risks for the financial market a different type of license should be required. Second, the stablecoins should be partially backed by reserves held with a Swiss bank.

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[7] https://jarvis.network/protocol

[8] https://www.finma.ch/fr/news/2019/09/20190911-mm-stable-coins/

[9] For instance compared to other local currencies : https://www.swisscurrencyconfederation.ch/systems/

[10] 4A_200/2019, consid.5 « *Bei WIR handelt es sich nicht um eine Schuld in einer ausländischen Währung, sondern die WIR Wirtschaftsring-Genossenschaft, heute WIR Bank Genossenschaft, schuf als private Organisation mit dem sog. WIR-Geld eine private Geldordnung* »

[11] https://www.swissbanking.ch/en/news-and-positions/news/the-deposit-token-sba-white-paper-on-a-digital-swiss-franc

Therefore, we suggest the following cascade system for the creation of stablecoins:

- Up to CHF 10 million: A sandbox for the creation of stablecoins should be established, similar to the existing sandbox in banking law. This sandbox should only be accessible to financial intermediaries (Finanzintermediäre; intermédiaires financiers) under the Federal Act on Combating Money Laundering and Terrorist Financing. In addition, issuers should keep a reserve of 40% of the stablecoin's value at a Swiss bank.
- Up to CHF 100 million: Holders of the license according to art. 1b of the Banking Law should be allowed to create stablecoins. These stablecoins should also comply with AMLA regulations, and a reserve of 40% of the stablecoin's value should be kept at a Swiss bank.
- Above CHF 100 million: Banks should be allowed to create stablecoins, subject to regulatory approval. The reserve requirement should also be set at 40% of the stablecoin's value.
- The reserves should be kept either with a Swiss bank or with the Swiss National Bank.

In addition, we can hereby refer to the Swiss Blockchain Federation’s report (BLOCKCHAIN – AUFSICHT UND REGULIERUNG) section n°3 upon which we abide entirely. Further, we refer to section n°3.1 above regarding the exemption of stablecoins from securities.

5. Application: A Hub for Platform of Exchange

5.1. Problem

Despite introducing an authorization regime for those type stakeholders (art. 73a ff FMIA i.e. for platforms of exchange trading DLT securities), Switzerland does not host nor attract many nor important platforms of exchange. The reasons for this meager success lie in the fact that requirements set are non-competitive and the license is particularly resource intense, which makes the current model impractical. In particular, decentralized models are ostracized under Swiss law.

In our view, it is justified to explore a sandbox regime that would benefit new and existing actors; as well we need to set clear rules regarding DeFi application under FMIA. In neighboring jurisdiction, we note that the EU introduced in that regard a special pilot regime for DLT market infrastructure that could be used as inspiration[12].

5.2. Solution

We suggest the following measures:

- Create a sandbox regime for DLT trading facilities enabling even anonymous[13] retail user to freely acquire DLT securities from Swiss SME without restriction (e.g. under a new art. 73i FMIA). This regime should allow financial intermediaries (AMLA)[14], Fintech licensees (1b) and Banks (1a) to exploit a platform of exchange dealing with DLT securities under 973d CO (only and not securities as a whole) without requiring a supplementary license (announcement duty only). In our view, the sandbox should be limited by the yearly volume of activity depending on the initial license of the entity (e.g. 250, 500 millions, 1 billions in CHF).
- Liberalize the secondary market for DeFI by namely recognizing that decentralized platforms (criteria discussed below) does represent a bilateral relationship between buyers and sellers, which is not subject to FMIA (e.g. by complementing art. 42 al.1 FMIA and namely excluding those systems when they can be considered as decentralized)[15]. In our view, the purchase of a share in a Swiss company between two parties should be made as simple as using Twint.
- The main criteria to determine whether a system is to be considered as decentralized is in our view that :
    - 1. None of the instruments exchanged (payment instrument / DLT securities) are - at any time - in custody nor in factual power of disposal of the operator;
    - 2. The infrastructure is deployed on a public blockchain;
    - 3. The operator should be allowed to perceive a fee for its service and notably retain a listing / unlisting power over the DLT securities, and a Liquidity provider Whitelisting power.

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0858
[13] Indeed, anyone can already acquire shares of a Ltd. (973c) anonymously, hence we believe that there is no reason to differentiate within the digital environment.
[14] Those stakeholders often already enable the transfer of tokens versus other tokens. Hence, they could literally overnight list
[15] AMLA regulation should still then be applicable.

    - 4. The operators bear no liability nor represent a contractual party in the sale contract.
- Additionally, we can hereby refer to the Swiss Blockchain Federation's report (BLOCKCHAIN – AUFSICHT UND REGULIERUNG) section n°4 upon which we abide entirely.

6. Application: Dedicated Legal Form for DAOs

6.1. Problem

Under the umbrella term "decentralized autonomous organizations" (DAOs), a large number of organizations have emerged in recent years that operate autonomously without a classic hierarchy and based on purely decentralized decision-making processes. Even if the concept of an autonomous, self-executing and self-enforcing society without the usual central organs may still sound futuristic, there are already more than 10,000 DAOs with assets under management of almost 10 billion dollars and almost 5 million members. It is therefore already much more than a purely marginal phenomenon.

From a legal perspective, however, a variety of legal questions are still unclear. Due to the global and distributed peer-to-peer nature of DAOs, traditional conflict-of-laws approaches are reaching their limits. While the first DAOs were more or less deliberately designed without a legal structure, attempts are increasingly being made to embed technical governance in law by means of existing legal institutions. In Switzerland, in addition to the foundation, the association in particular is increasingly being used in the context of DAOs. However, while other jurisdictions such as Wyoming with its DAO LLC have introduced dedicated legal forms for decentralized organizations, Swiss law is currently not able to cover such decentralized structures in a fully adequate manner.

6.2. Solution

Switzerland, with its federal system, high level of legal certainty and liberal basic structure, should be predestined to provide a legal home for DAOs as global peer-to-peer organizations. Switzerland is already home to a large number of international organizations in general and blockchain protocol foundations in particular. With regard to DAOs, there are various projects that want to use legal structures in Switzerland, despite the fact that those are not yet very suitable for peer-to-peer organizations. Other countries, such as the USA with its state of Wyoming, have shown that DAO structures can be appropriately integrated into existing company law. In order to comprehend DAOs holistically from a Swiss perspective as a new organization form *de lege ferenda*, the following principles can be defined for a new DAO legal form:

A new DAO form shall be introduced which qualifies as a legal person. The *decision-making* within the DAO shall be done by the community of members. The legal concept of a ballot vote (*Urabstimmung*) developed for associations and cooperatives, which includes all members and can also be carried out without written form requirements, seems very appropriate for this purpose. Blockchain-based voting allows decisions to be made in a highly transparent and tamper-resistant manner. The *implementation* of decisions, an activity which in the traditional world is the responsibility of the executive body, is carried out in a DAO by smart contracts. Instead of natural persons as auxiliary persons to implement the decisions, a self-implementing and self-enforcing program is used for this purpose. It should be up to the DAO whether natural persons as “link” to the real world shall be foreseen.

In addition, a DAO shall be able to embody its membership rights in ledger-based securities acc. to art. 973d et seq. CO, analogous to equity shares of a corporation. This is currently not possible in regard to membership rights of both an association as well as a cooperative.

The *liability* of the members of a DAO company should be limited. Analogous to the association, it does not seem necessary to require registration in the commercial register. However, since the DAO ballot is the only non-algorithmically controlled body, it must be clarified what happens if the DAO members deliberately oppose a court order, for example. The DAO model law of the "Coalition of Automated Legal Applications" (COALA) provides for this case that those members who oppose the order in the context of the vote become proportionally liable on the basis of their DAO share.

In addition, we propose to exempt DAOs from the Collective Investment Schemes Act, as these are self-managed entities. Besides, we would suggest modernizing the CISA and introducing a new category of investment vehicle that would enable DAOs to become an investment vehicle accessible to retail users.

Cumulatively to the creation of a legal form for DAOs, one could look into adapting the rules of the simple partnership (art. 530 ff CO), which could enable more conventional leeway for the parties regarding the liability, management, and the dissolution rules.

7. Application : Better investment vehicle under CISA

Problem

The CISA foresees a very heavy regulatory regime for collective investment schemes under Swiss law. As a matter of consequence, the practicality and opportunity of setting up a fund in Switzerland, compared to Luxembourg or applying as a foreign fund, is made unattractive. In addition, the CISA does not foresee an entity that would be fitted to the new digital era or the DAOs model, which enables retail investors to pool and invest easily their assets. Consequently, those types of activity have no reasonable chance of being developed on our soil.

Solution

We propose first that the list of exemptions under art. 2 al.2 CISA includes a sandbox regime under 1 million CHF of assets. Further, we advocate for the creation of a (light) new authorization regime dedicated to small funds from 1 to 20 millions CHF where retail investors can participate and where funds can be held in cryptoassets (without deposit bank).

8. Application: International Equivalence Regime

8.1. Problem

The role of Switzerland as a central jurisdiction connected with the rest of the world is essential for the success of our country. As we are not a EU member state, we notably cannot benefit from the EU passport, which would provide easy access to the EU market.

This access will be even more limited when MICAR will enter into force, as most of the activities of crypto-asset service providers require the incorporation of an entity within the Union. Consequently, projects established in Switzerland might be also forced to create a structure within the EU besides the Swiss one. This situation makes our country unattractive as projects are never limited to the targeting of Switzerland as a market.

8.2. Solution

We advocate for the realization of the following achievements.

- First of all, we should obtain from the EU that a company authorized under Swiss law as a Financial Intermediary license (AMLA) is able to provide its services (crypto or not) within the EU, based on a decision of equivalence from the EU commission[16].
- Secondly, regarding crypto-asset services and MICAR in particular, we need to push urgently in order to obtain that an equivalence regime applies for Swiss (crypto) service providers in the EU (As mentioned under art. 122 al.1 let.K MICAR[17])
- Thirdly, Swiss entities should be allowed to make public token offerings within the European Union. This should encompass utility, payment and security tokens.

[16] We note that, as of now, Swiss law does not require foreign companies whose activities would fall under AMLA to request a financial intermediary license in Switzerland when its activity is strictly online. Consequently, any company that would sit in the EU would benefit from both the EU passport and access to the Swiss market, whilst the opposite is not true making Switzerland unattractive.

[17] "By … [36 months after the date of entry into force of this Regulation] after consulting the EBA and ESMA, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation, where appropriate accompanied by a legislative proposal. [...] an assessment of whether an equivalence regime should be established for third-country crypto-asset service providers, issuers of asset-referenced tokens or issuers of e-money tokens under this Regulation;"

9. Application: Bank accounts for Crypto Companies

9.1. Problem

Switzerland is well known for its banking industry. However, most banks are uneasy whenever the clients deal with cryptoassets and prefer most of the time the termination of their customer relationship whenever clients have even a residual connection with blockchain. As a matter of consequence, the banks offering those services are scarce and the services are expensive for SMEs.

9.2. Solution

In our view, banks should not be able to discriminate against their clients based on the mere fact that their activities are linked to the blockchain industry (amongst others). In complete alignment with the concept of technological neutrality developed by the FINMA, we advocate for the obligation of banks to be technologically neutral vis-à-vis the activities of their clients.

In this vein, we would propose a new article in the Banking Act (Art. 3i BA) that would in essence state that Swiss banks are not allowed to discriminate nor refuse a banking relationship based on the nature of the assets accepted.

Art. 3i

Les banques (art. 1a LB) doivent respecter le principe de neutralité technologique. Elles ont l'interdiction de discriminer ou de refuser leurs clients sur la base de leurs seules activités ou des biens déposés.

10. Application: Tax certainty as a key argument for Switzerland

10.1. Problem

Switzerland is positioning itself as a global hub for cybersecurity and digital ethics and is home to leading players in this field based on blockchain technology. Many cantons support the idea of international cyber security regulation and welcome initiatives such as the "Trust Valley" initiative and the Swiss Digital initiative to promote ethical and trust standards in the digital world with, for example, the Cyber Peace Institute with the aim of supporting victims of cyber attacks, facilitating the investigation and research into cyber attacks and promoting responsible behaviour in cyberspace. Distributed ledger technologies (DLTs) are among the notable and potentially promising developments in the digital world. These developments hold considerable potential for innovation and efficiency gains, which can support key sectors of the future for Switzerland, both in the financial sector and in other economic sectors.

Pursuant to article 56 LIFD respectively article 23 LHID,[18] foundations, associations, and other legal entities may be exempt from taxation if they pursue charitable, public or cultural purposes.[19] Legal entities with idealistic purposes are not taxed upon application, subject to conditions (e.g. provided that they do not exceed CHF 20,000, profit is exclusively and irrevocably dedicated to these purposes, an open circle of beneficiaries may benefit from grants). In our view, the Swiss model of foundation (illustrated by the Ethereum foundation) should be promoted for they are an expression of citizens' voluntary commitment to the common good and can also act as governance stakeholders in blockchain projects.

While the purpose of a foundation is the essence of its very existence, it is its commercial or profit-making activities - in other words the lack thereof - that form the basis for its effective tax exemption. We believe a greater recognition of the purpose shall be emphasized when this purpose represents a significant contribution to Switzerland and the community. Thus, "hybrid" purposes of a public interest or even ideal nature with an economic component should be considered more. To date, the limitations are restrictive, particularly with regard to the amounts allowed for tax exemption. In addition, a broad circle of beneficiaries criteria could be accepted instead of an open circle of beneficiaries.

10.2. Solution

While Switzerland is contemplating moving towards state support to remain attractive due to the implementation of the OECD worldwide tax reform, the cantons have to promote other assets such as tax certainty and greater support to remain competitive in terms of company location. We propose to add to the list of art. 56 LIFD, respectively art. 23 LHID an exemption[20] for the foundation model when the institution promotes innovative technology that make it possible to act in areas where the state is either not expected to intervene in the first place or it pursues a public interest purpose or a public utility (e.g. consumer

[18] RS 642.11 Federal Direct Tax (LIFD) Act of December 14, 1990 respectively RS 642.14 Communal and Cantonal Direct Tax Harmonisation (LHID) Act of December 14, 1990

[19] This is the case, for example, for activities of charitable, humanitarian, health, environmental, scientific, social, educational or cultural character.

[20] Eventually a partial tax exemption could be studied.

protection,[21] data security, citizen empowerment [22]) that would include specific but large circle of beneficiaries and commercial activities :

art. 56 LIFD respectively art. 23 LHID
Sont exonérés de l'impôt:

h. respectively g. les personnes morales qui poursuivent des buts à caractère de service public ou d'utilité publique dans le secteur de l'innovation technologique, sur le bénéfice de manière prépondérante et irrévocablement affecté à ces buts. Des buts économiques ne peuvent être considérés en principe comme étant d'intérêt public à moins que l'intérêt au maintien des buts économiques occupe une position subalterne par rapport aux buts d'intérêt public et que des bénéficiaires n'exercent pas de positions dirigeantes;

[21] Consumer protection was enshrined in the Federal Constitution following the popular vote of 14 June 1981 and was included in Article 97 of the 1999 revision of the Constitution. Together, they cover various areas of consumer law, such as the safety of products and services or consumer information.
[22] i.e. to give power or rights back to the person worthy of protection under Swiss constitutional law.

11. Application: Unfair Competition in the crypto industry

11.1. Problem

The token based economy creates opportunities for malicious actors to benefit from the manipulation of prices and other behavior that would be considered as unfair under the UCA (Unfair Competition Act).

We note that, as of the current state of the regulation, some tokens have previously been considered as merchandise, hence giving jurisdiction under the UCA. As of now, these authorities have been discrete on the matters.

Further, we note that the list of conditions set under art. 3 al.1 let.s UCA seems complicated in the context of smart contract where clients can interact directly with the blockchain (and not necessarily via a website) and usually do not provide an email address as reference.

Furthermore, the governance and organization of a certain blockchain (e.g. when malicious nodes gather to influence the prices) might be considered under the scope of the UCA.

11.2. Solution

In our view, the authorities shall further study the opportunity to whether Swiss law should be specified for the use case mentioned above. It addition, the adequacy of the protection of Swiss law under the UCA should be assessed in order to determine whether it sufficiently protects clients in the crypto industry in particular when dealing with tokens that are to be qualified as payment, utility token, or tokens namely excluded from the securities token categories (see proposition above).

art. 3 al.1
x. Opère de façon déloyale dans le contexte des systèmes DLT.

12. Application: Crypto is not a game

12.1. Problem

The Gaming Act contains various very broad definitions that may include tokens under its jurisdiction. For instance, the famous crypto kitties are still prohibited from the Swiss internet.

12.2. Solution

In our view, the token based economy, whenever it has only a limited link with the gaming industry, shall be clearly distinguished and exempted from the Gaming act. As a solution, we propose to add in the list of exemptions under art.1 al.2 GA an exemption that goes in this sense when the gaming aspects are not deemed predominant.

13. Application: Anti-money laundering

We can hereby refer to the Swiss Blockchain Federation's report (BLOCKCHAIN – AUFSICHT UND REGULIERUNG) section n°2 upon which we abide entirely, in particular regarding the travel rule.

Further, we note that the art. 4 al.1 let.b AMLO should be modified in a way that restrict the currently wide possible interpretation. Indeed, any activities might fall under the notion of "aide à transférer des monnaies virtuelles à un tiers pour autant qu'il entretienne une relation d'affaires durable avec le cocontractant ou qu'il exerce un pouvoir de disposition sur les monnaies virtuelles pour le cocontractant [...];".

Furthermore, the decentralized platform model (presented above) should allow relative anonymity to be possible under AML regulation.

14. Application: Fintech License

We can hereby refer to the Swiss Blockchain Federation's report (BLOCKCHAIN – AUFSICHT UND REGULIERUNG) section n°8 upon which we abide entirely.