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Switzerland: Law & Practice

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SWITZERLAND

Law and Practice

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Pestalozzi is a multicultural full-service Swiss business law firm that has focused on high-end work for domestic and international clients since 1911. Its lawyers are known for their truly independent approach to advising and representing their clients. The firm guides and supports its clients in their strategic business decisions, anticipates their future challenges and helps them solve their critical issues. Being fully integrated, Pestalozzi encounters no internal limits in shaping the most competent and efficient teams for clients' needs. With more than 100 professionals in Zurich and Geneva, the firm is at home in Switzerland's two main commercial hubs, and has developed a wealth of experience in its key industries of banking, life sciences, commodity trading and insurance. While being locally embedded, Pestalozzi has also developed sought-after expertise in dealing with multi-jurisdictional transactions and disputes.

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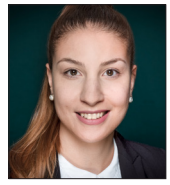

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1. Blockchain Market

1.1 Evolution of the Blockchain Market

Despite the continued influence of the wider macro-economic turbulences on the Swiss blockchain market, the past 12 months have resulted in an increase in the valuation of blockchain and cryptocurrency companies in Switzerland.

According to the latest CV VC Top 50 Report 2023, the aggregate valuation of the top 50 blockchain and cryptocurrency companies in Switzerland and Liechtenstein reached USD373.45, a sharp increase from the valuation of USD85 at the end of 2022. Nevertheless, the valuation still remains below the peaks witnessed in prior years.

Overall, the valuation exemplifies the positive performance and resilience of the Swiss blockchain market – commonly dubbed "Crypto Valley". Hence, the outlook for the Crypto Valley remains optimistic as both established companies and start-ups continue to develop and adapt technologies.

Within the Crypto Valley, Zug continues to retain its leading position as a hub for the industry: 512 out of a total of 1,244 blockchain and cryptocurrency companies in Switzerland are based in Zug. However, a certain shift in the distribution of such companies has occurred as other Swiss regions experienced an increase in blockchain and cryptocurrency companies. For instance, Zurich now hosts 289 companies and has thereby consolidated its position as an important centre within the Crypto Valley. Moreover, Geneva and Ticino also show an increase in their respective number of companies.

As of 31 December 2023, the market participants that are subject to supervision by the Swiss Financial Supervisory Authority (FINMA) included five fintech companies. These institutions hold a fintech licence, which allows them to accept public deposits of up to CHF100 million or crypto-based assets (provided that these are not invested and no interest is paid on them).

The above-mentioned macro-economic factors are likely to determine the further development of the Swiss blockchain and cryptocurrency industry. Additionally, the impending entry into force of the EU's Markets in Crypto-Assets Regulation (MiCA), establishing a unified regime across the EEA, will also have an impact on Swiss blockchain and cryptocurrency companies. Since Switzerland is neither a member of the EU nor the EEA, MiCA does not apply directly to Swiss companies. However, as soon as Swiss companies provide services within MiCA's scope to customers based in the EU, they will need to be compliant with the requirements stipulated by MiCA (subject to any applicable exceptions).

1.2 Business Models

The use cases of blockchain in Switzerland include cryptocurrency exchange platforms, tokenisation platforms, custodial and non-custodial wallet services, hot and cold storage solutions, supply chain and trade finance solutions, and decentralised finance (DeFi) applications.

For example, in relation to trading in securities and the clearing and settlement of securities operations, the SIX Digital Exchange (SDX) – the world's first fully regulated financial market infrastructure digital asset exchange – provides fully integrated issuance, trading, settlement and custody infrastructure for digital assets. SDX focuses on a business-to-business model and operates as regulated financial market infra-

structure, including functioning as an exchange and a centralised securities depository. SDX became a member of the Enterprise Ethereum Alliance in April 2021.

When considering the enquiries from within the blockchain and cryptocurrency industry to FINMA, a majority thereof concerned issues pertaining to trading and custody of payment tokens – notably with regard to the segregation of payment tokens held in custody for clients in the event of a bankruptcy. Furthermore, FINMA noted an increase in enquiries relating to questions concerning staking, as a consequence of the transition of the Ethereum away from a proof of work (PoW) to a proof of stake (PoS) model, which occurred in 2022.

Moreover, FINMA received around 100 authorisation enquiries throughout the year 2023 – a number similar to 2022. The projects submitted to FINMA ranged across different fields, amongst others, DeFi, tokenisation of assets, and the usage of tokenised assets in the metaverse.

2. Digital Assets

2.1 Ownership

As a rule, each individual asset must be transferred according to the specific rules applicable to it. The same principle applies to digital assets. Under Swiss law, it is generally understood that digital assets are not subject to traditional property law but follow their own rules as far as ownership and transfer are concerned. So far, only so-called ledger-based securities have been explicitly regulated in Swiss law as part of the so-called Distributed Ledger Technology Bill ("DLT Bill"). Ledger-based securities are rights the ownership of which may only be exercised and transferred to others via a securities ledger. Ledger-based securities may represent a variety of rights, including certain membership rights, claims and copyrights.

The DLT Bill does not explicitly answer the general question as to when the transfer of ledger-based securities is final. Rather, the answer is left to the underlying technology and the (registration) agreement between the parties. Since the private key effectively confers the power to dispose over a digital asset (such as a ledger-based security), it can be argued that signing a transaction on the blockchain with the private key allows for transfer ownership. In many cases, however, the transaction is only deemed valid after a validation or staking process associated with the particular blockchain used.

However, if the creditor of a ledger-based security becomes bankrupt, for example, after it disposed of a ledger-based security, the DLT Bill provides that such disposal will be legally binding and effective towards third parties if it became irrevocable according to the distributed ledger's rules (or any other trading system) and it has actually been entered into the ledger within 24 hours.

2.2 Categorisation

In broad terms, digital assets (such as payment tokens, utility tokens and security tokens) are classified as intangible assets that can be the object of contractual agreements. The prevalent categorisation of digital assets initially stems from FINMA and distinguishes between three types of tokens:

- payment tokens;
- utility tokens; and
- asset tokens.

This token categorisation and the treatment of tokens by FINMA are rather straightforward from the perspective of the Swiss financial market laws. FINMA's focus is on the economic function and purpose of a token (substance over form), and follows the principle of "same risks, same rules", while taking into account the specific features of each project.

Payment Tokens

These are synonymous with cryptocurrencies, such as Bitcoin, and are intended to be used, now or in the future, as a means of payment for acquiring goods or services, or as a form of money or value transfer. Cryptocurrencies give rise to no claims on their issuer, so FINMA will not treat payment tokens as securities. However, if payment tokens were to be classified as securities through new case law or legislation, FINMA would accordingly revise its practice.

Utility Tokens

These are tokens that are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure. FINMA will not treat utility tokens as securities if their sole purpose is to confer digital access rights to an application or service, and if the utility token can actually be used in this way at the point of issue. In such cases, FINMA is of the view that the underlying function is to grant access rights, and the connection with capital markets – which is a typical feature of securities – is missing. However, if utility tokens have an investment purpose at the point of issue, either additionally or solely, FINMA will treat such tokens as securities in the same way as asset tokens.

Asset Tokens

These represent debt or equity claims on the issuer. For example, asset tokens promise a share in the future company earnings or future capital flows. In terms of their economic function, therefore, these tokens are analogous to equities, bonds or derivatives. Tokens that enable physical assets (such as commodities or real estate) to be traded on the blockchain would also fall into this category, so FINMA will treat asset tokens as securities if they represent an uncertificated security and the tokens are standardised and suitable for mass standardised trading.

2.3 Tokenised Securities

Pursuant to the Swiss Financial Market Infrastructure Act (FMIA), DLT effects (DLT securities) are securities in the form of:

- book-entry securities (Article 973d of the Code of Obligations (CO)); or
- other uncertificated securities that are held in distributed electronic registers and that use technical procedures to give creditors, but not the debtor, power of disposal over the uncertificated security.

A book-entry security pursuant to Article 973d CO is a right that pursuant to an agreement between the parties:

- is entered in a register of uncertificated securities; and
- can only be asserted and transferred to others via this register of uncertificated securities.

The Capital Markets and Technology Association (CMTA) is an independent association formed by leading actors from Switzerland's financial, technological and legal sectors to create common standards around issuing, distributing and trading securities in the form of tokens using the distributed ledger technology. CMTA has

developed the CMTA standard token for securities (CMTAT), which is a framework designed to facilitate the tokenisation of both equity and debt securities in accordance with Swiss law. The CMTAT enables the creation of ledger-based securities, adhering to the provisions outlined in Article 973d CO. While its primary focus is on a description of how stock corporations under Swiss law can tokenise their participation rights (shares, participation certificates or dividend-right certificates), its modular structure also makes it suitable for tokenising other types of securities, including debt instruments and structured products.

2.4 Stablecoins

Stablecoins are currently not governed by any specific regulation in Switzerland. FINMA applies its supervisory approach to stable coins in line with its established method for blockchain-based tokens. Emphasising the token's economic function and purpose (substance over form), it adheres to the principle of regulating similar risks with similar rules. FINMA has observed that initiatives involving stable coins frequently trigger potential licensing obligations under either the Swiss Banking Act or the Swiss Collective Investment Schemes Act.

Stablecoins backed by deposits of fiat currency or by "algorithmic" stabilisation mechanisms are neither payment tokens nor security tokens, per se. In any case, stablecoin projects often give rise to potential licensing requirements.

For example, a stablecoin backed by deposits of fiat currency with a fixed redemption right of the token holder may be subject to the Swiss banking regulation. If that stablecoin project would also qualify as a payment system, it may additionally be subject to the Financial Market Infrastructure Act, provided that the payment system reaches the threshold of "significant importance" to the Swiss economy. Should the stabilisation mechanism depend not on the issuance and redemption of tokens and the sale or purchase of a currency but, alternatively, on the price development of a basket of currencies or commodities, which is managed by the system's operator, there is the risk that the stablecoin and the issuer will be subject to the Collective Investment Schemes Act.

Finally, FINMA has found that the Anti-Money Laundering Act (AMLA) is "almost always" applicable to stablecoins and the issuer, as the payment feature usually appears to be a pivotal element. Applying this approach to stablecoins linked to currencies, commodities, real estate or securities, for example, will prompt any issuer or sponsor of stablecoin projects to pre-assess the project from a supervisory perspective, particularly with respect to Swiss banking regulation, financial market infrastructure regulation, securities and funds regulation and anti-money laundering regulation.

2.5 Other Digital Assets

Other than the categorisation outlined in **2.2 Categorisation** and in line with Switzerland's approach of technologically neutral legislation, there is no further legal characterisation of digital assets.

In the absence of a legal characterisation, NFTs are generally characterised by their non-interchangeable nature (as opposed to fungible tokens). Further, NFTs are usually non-divisible in nature and are thus amenable to blockchain projects related, for example, to the digitisation of unique objects (such as pieces of art, luxury goods and real estate), digital identity and digital certifications.

Apart from their uniqueness, NFTs are comparable to other tokens. Therefore, FINMA's categorisation (see **2.2 Categorisation**) is also applicable to NFTs until further notice. The categorisation is also decisive for tax purposes, given that no Swiss tax laws are specifically applicable to NFTs. Depending on the token category to which the NFTs are assigned, sales of NFTs may be subject to VAT or other taxes (see **6.1 Tax Regime**).

Due to its lack of standardisation and suitability for mass trading, an NFT should not qualify as an asset token in principle. It can also be assumed that NFTs are not issued for the purpose of being used as a means of payment between third parties. Therefore, NFTs should also not qualify as payment tokens, and the issuance and trading of NFTs should not be subject to Swiss money laundering regulations.

However, it cannot be excluded that the new phenomenon of so-called fractionalised NFTs (F-NFTs) may qualify as asset tokens if ERC-20 tokens are issued "in the same structure and denomination".

Since the design of smart contracts can vary widely, case-by-case consideration becomes unavoidable. Therefore, until FINMA (or the courts) develops clear guidelines, the uncertainty remains considerable and the direct exchange with authorities is correspondingly valuable.

In a recent statement, the Swiss Federal Council declared that it was closely monitoring the latest blockchain developments on NFTs, as there is not yet any international consensus on the regulatory treatment thereof.

From a Swiss financial market supervisory perspective, it can thus not be excluded that the issuance and/or transfer of such tokens will be subject to some degree of financial market regulation. In broad terms, the general principles of law and existing statutes will apply – regarding, for example, data protection, intellectual property and creditor and investor protection.

2.6 Use of Digital Assets in Payment

In Switzerland, payments for goods and services made with cryptocurrencies are basically allowed, and there are no specific cryptocurrency-related limits.

For such payments, the general principles of Swiss civil law apply, notably contract law. Therefore, the limitations that do apply are to be found in the Swiss CO, which sets out the material and formal requirements for the valid entry into and performance of agreements such as purchase agreements, service agreements and employment agreements.

2.7 Use of Digital Assets in Collateral Arrangements

Under Swiss law, the use of digital assets as part of collateral arrangements is permissible. Furthermore, the general provisions in relation to collateral also apply to digital assets. As such, a lender can take collateral for a loan in the form of a pledge or a transfer of "ownership" of claims by entering into a separate security agreement. Claims can be either pledged or assigned for security purposes.

In terms of digital assets, the DLT Bill sets out that a collateral (eg, lien) can also be established without transferring the ledger-based security if the collateral is visible in the ledger and, at the same time, it is guaranteed that only the security taker can dispose of the ledger-based security in the event of default.

3. Smart Contracts

3.1 Enforceability

In Switzerland, there are no laws, regulations or binding judicial decisions addressing the legal enforceability of smart contracts. Swiss legal doctrine largely agrees that a smart contract as such should not qualify as a contract in the sense of the Swiss CO. Smart contracts are rather understood as software linked to data sources based on the blockchain, which independently fulfil the contractual rights and obligations anchored therein when certain conditions are met.

Due to the automated character of a smart contract, the application of civil law principles concerning the formation and execution of traditional contracts to smart contracts raises questions. According to the prevailing doctrine, a computer system lacks the legal personality required to enter into a contract. There might also be legal uncertainty due to the pseudonymity of the users or participants in blockchain networks, and even their legal capacity to initiate transactions that are then automatically executed by the smart contract could be questioned. The legal validity of arrangements related to smart contracts is not, however, prima facie excluded.

4. Blockchain Regulation

4.1 Regulatory Regime

4.1.1 Regulatory Overview

In Switzerland, the existing laws are applied in a technology-neutral way. In order to avoid having legal gaps, the Federal Law on the Adaptation to Developments in Distributed Ledger Technology and the accompanying ordinance (the "DLT Bill") entered into force in 2021.

The DLT Bill entails specific amendments to the following ten existing federal laws:

- the Swiss CO;
- the Federal Intermediated Securities Act;
- the Federal Act on International Private Law;
- the Federal Debt Enforcement and Bankruptcy Act;
- the Federal Banking Act;
- the Federal Financial Institutions Act;
- the Federal Financial Market Infrastructure Act;
- the Federal Financial Services Act;
- the AMLA; and
- the Federal Act on the Swiss National Bank.

One of the key amendments of the DLT Bill was the introduction of a licence for DLT trading facilities. Licensing as a DLT trading facility allows for the multilateral trading of DLT securities. The financial market infrastructure for DLT securities can admit other companies and persons to trading, as well as financial intermediaries.

In addition to the DLT trading licence, the DLT Bill improved the framework conditions for companies using blockchain in Switzerland through the introduction of book-entry securities on a blockchain. Moreover, legal certainty has been increased in insolvency law by explicitly regulating the segregation of crypto-based assets in the event of bankruptcy (see **4.1.6 Resolution or Insolvency Regimes**).

Finally, the DLT Bill also addressed identified risks in the area of money laundering and terrorist financing.

Initially, FINMA clarified that the existing laws remain applicable to blockchain-based companies or cryptocurrency-related business models, subject to any changes in law or amendments

to existing statutes. Going forward, market participants using blockchain technology or cryptocurrency may be subject to one or more laws, as the new rules will only partially amend the existing statutes.

4.1.2 Licensing

Neither blockchain technology nor cryptocurrencies are governed by any sector-specific laws or regulation. Therefore, existing laws and regulations apply to the new blockchain technology and, respectively, blockchain-based business models. Consequently, before a blockchain-based business model is implemented or digital assets are marketed, the project owner should be aware that several statutes may apply in Switzerland (in addition to foreign laws).

For example, an initial coin offering (ICO) and/or the envisaged business model may trigger licensing requirements pursuant to one or more Swiss financial market regulations (such as the Banking Act, the Collective Investment Schemes Act, the Financial Services Act, the Financial Institutions Act, the Financial Market Infrastructures Act and/or the AMLA). The licensing requirements are very much dependent of the applicable laws as well as the level of risks associated with the business model. Depending on the activity, a licence as a bank, securities firm, trading platform or other types of licensing requirements may apply.

4.1.3 Marketing

The rules applicable to marketing of digital assets are dependent on the initial qualification of the digital assets. In general, marketing activities in Switzerland are subject to the conduct rules under the Swiss Unfair Competition Act.

In addition, specific financial market regulatory provisions, particularly the special requirements of the Swiss Financial Services Act and the Swiss Collective Investment Schemes Act may apply if the digital assets qualify as financial instruments or collective investment schemes (particularly asset tokens). Depending on the nature and scope of the activity (sole marketing, offer, service provision), such requirements may solely consist in the obligation to designate marketing material as such or expand to comprehensive regulatory conduct rules, such as prospectus requirements and affiliation obligations.

4.1.4 Anti-money Laundering and Counter-Terrorism Financing (AML/CTF) Requirements

The AMLA states that financial intermediaries are persons who, on a professional basis, accept or hold onto deposit assets belonging to others or assist in the investment or transfer of such assets. They include persons who provide services related to payment transactions, in particular by carrying out electronic transfers on behalf of other persons, or who issue or manage means of payment such as credit cards, travellers' cheques or virtual currencies, or who accept such virtual currencies.

In principle, persons transferring digital assets such as payment tokens may qualify as financial intermediaries and, as such, are subject to both the simplified and the enhanced due diligence duties. For example, a cryptobroker must identify the customers with which it is dealing and determine the beneficial owner of the assets.

Furthermore, if legal entities are customers of a cryptobroker, the broker must determine the controlling persons of those legal entities and be provided with certain corporate documents and powers of attorney. Under certain circumstances, the cryptobroker must also clarify the economic background and the purpose of a crypto transaction or a business relationship (eg, if the

transaction or the business relationship appears unusual or to be very risky).

4.1.5 Change in Control

Under Swiss law, there are no specific change in control requirements applicable to digital asset firms. Instead, digital asset firms are subject to the same general rules as other firms outside the blockchain and cryptocurrency industry. If the business model is subject to licensing requirements in Switzerland, change in controls regularly trigger notification or authorisation requirements.

4.1.6 Resolution or Insolvency Regimes

As part of the DLT Bill, the Swiss legislator also amended the Debt Enforcement and Bankruptcy Act (DEBA). Thereby, an explicit legal basis was stipulated for the segregation of crypto-assets held for the beneficial owner by a custodian, in the event of the latter's bankruptcy.

Such segregation of crypto-assets is subject to two prerequisites.

- First, the custodian (ie, the debtor in bankruptcy) must have undertaken to the beneficial owner (ie, the third-party in bankruptcy) to keep the crypto-assets available for the beneficial owner at all times, meaning that the beneficial owner has uninterrupted power of disposal over the crypto-assets.
- Secondly, the crypto-assets must be individually attributable to the third-party or to a community of owners, and the individual share of the third party of such communal assets must be known.

If the above criteria are met, the beneficial owner has a claim for the surrender of the crypto-assets against the bankruptcy estate of the custodian, however, it should be noted that the cost arising from such surrender must be borne by the beneficial owner, not the bankruptcy estate.

Beyond this segregation of crypto-assets, the general Swiss resolution or bankruptcy regime applies to digital asset firms.

4.1.7 Other Regulatory Requirements

Firms active in the blockchain market should consider evolving legal areas, such as ESG and sanctions. While certain general rules may be applied on a technology-neutral basis, the inclusion of explicit references to digital assets can be observed in newly issued legal frameworks. For instance, the Swiss Ordinance on measures in connection with the situation in Ukraine equates crypto-based assets with traditional funds (money, etc) and also addresses specific restrictions with regards to crypto-based assets that should be considered.

4.2 Regulated Firms/Funds With Exposure to Digital Assets

As far as there are no specific legal definitions of the specific digital asset in question (eg, in the case of DLT securities or crypto-based assets), digital assets need to be qualified within the categories provided for traditional assets. Due to the principle of technology neutrality, the existing rules applicable to traditional asset categories must also be applied by companies operating with digital assets.

4.3 Regulatory Sandbox

Under Swiss law, only a single regulatory sandbox exists, which can be used by Swiss blockchain-based businesses qualifying as banks.

In order to qualify for this banking sandbox, the blockchain-based business must satisfy the following requirements:

- the acceptance of deposits must not exceed the maximum amount of CHF1 million (even if such deposits are made by more than 20 depositors), provided that such deposits are not invested by the Swiss company and do not bear interest; and
- depositors must be informed (in writing) in advance that the Swiss company is not subject to FINMA supervision and that deposits are not covered by the deposit guarantee scheme.

If these criteria are fulfilled, the deposit-taking activity will not be deemed to be "on a professional basis".

Despite not being a "sandbox" by definition, it is worth mentioning that Swiss licensing requirements apply, in principle, to activities carried out on a "professional basis". The criteria of activities being carried out on a professional basis are defined separately for banks and other types of financial institutions. In most cases, activities are deemed to be carried out on a professional basis, if pre-defined thresholds are met/exceeded – eg, regarding the amount of assets under management, the number of clients, or the total gross earnings per year. Activities below such thresholds can be carried out without a FINMA licence (unless otherwise provided by law). However, carrying out such activities below the licensing thresholds does not exempt institutions from the requirement to affiliate with a self-regulatory organisation (SRO) if the activities fall within the scope of the AMLA (see **4.6 Self-Regulatory Organisations**).

4.4 International Standards

As part of its AML-legislation, Switzerland has implemented the recommendations of the Financial Action Task Force (FATF), particularly with respect to cryptocurrencies or virtual currencies as well as the FATF's guidance on the application of the risk-based approach to virtual assets and virtual asset service providers (VASPs).

In Switzerland, the AMLA applies to all activities of financial intermediaries related to crypto-assets. When Swiss financial intermediaries hold cryptocurrencies for others or assist in their transfer, they are subject to the same obligations as when fiat money, such as the Swiss franc, is involved.

FINMA has also issued guidance on payments on blockchain (FINMA Guidance 02/2019), to clarify and inform market participants about the regulatory requirements related to the FATF's "travel rule", with which financial intermediaries need to comply.

In order to implement the FATF's recommendation for dealing with VASPs, Switzerland also amended the Anti-Money Laundering Ordinance-FINMA (AMLO-FINMA) in 2021, reducing the threshold for customer identification in cryptocurrency exchange transactions from CHF5,000 to CHF1,000. On 1 January 2023, the partially revised AMLO-FINMA entered into force, taking into account the latest revisions to the AMLA and the Federal Council's Anti-Money Laundering Ordinance. Amongst other points, the revision specified the application of the threshold for transactions with virtual currencies. In view of the risks and recent instances of abuse, the threshold of CHF1,000 applies for linked transactions within 30 days (and not per day). In the context of exchange transactions of virtual currencies for cash or other anonymous means of payment, technical measures are mandatory to avoid the threshold being exceeded by such linked transactions. Furthermore, given that DLT trading facilities are also open to private clients, the scope of application of the AMLO-

FINMA was amended to the extent that it also applies to trading facilities for DLT securities.

Therefore, Switzerland as a whole goes beyond the international standards set by the FATF.

Apart from FATF recommendations and as regards blockchain-based payment systems or stablecoins, FINMA has also made it clear that the regulatory requirements for such payment systems are based on international standards, such as the Principles for Financial Market Infrastructures (PFMI).

4.5 Regulatory Bodies

FINMA is the most relevant regulatory body to businesses or individuals using blockchain technology or operating fintech companies in Switzerland. As supervisor and regulator, FINMA is responsible for protecting investors and creditors. It also ensures the proper functioning of the Swiss financial market and may, therefore, publish guidelines, information for individuals or public warnings.

In the field of blockchain and fintech, FINMA can be approached for a pre-assessment concerning tokens or business models. Applying a risk-based approach when dealing with institution's requests, FINMA is able to adapt its practice immediately in order to take increased market risks into account.

4.6 Self-Regulatory Organisations

In Switzerland, there are several SROs that may supervise blockchain-based businesses. In many cases, blockchain-based businesses that qualify as financial intermediaries need a licence from FINMA to operate as a financial institution (eg, a securities firm), as a bank (eg, fintech licence) or as financial market infrastructure (eg, payment system), which includes FINMA supervision in general.

Blockchain-based companies may also qualify as financial intermediaries but not require any financial market licence for their business activities. In particular, this applies to blockchain-based businesses that provide payment transaction services – ie, carry out electronic transfers for third parties or issue or manage means of payment, for instance (digital) credit cards. In such cases, financial intermediaries must nevertheless be affiliated with an SRO. Where the blockchain-based company does not hold a FINMA licence, FINMA may only supervise blockchain-based businesses indirectly via the SRO.

The SRO is responsible for monitoring its members' compliance with Swiss anti-money laundering regulation encompassing, inter alia, AMLA and the SRO's rules and regulations.

Apart from these SROs, various trade groups and associations have mushroomed in the Swiss blockchain ecosystem – eg, the Bitcoin Association Switzerland, the Swiss Blockchain Federation, the CMTA and the Crypto Valley Association. These associations have no supervisory powers but can participate in legal consultation processes and/or may set best practice standards on a non-binding basis. Examples of such standards include the Digital Assets Custody Standard and the AML Standards for Digital Assets (both published by CMTA).

4.7 Other Government Initiatives

On 2 February 2022, the Federal Council adopted its report on digital finance, highlighting the opportunities and risks of digitalised financial markets and specific fields of action are defined. In its report, the Federal Council defines 12

areas of action, where specific measures shall be implemented by the Federal Department of Finance. The areas of action address the need for not only legal/regulatory adjustments, but also innovation support and market development measures, and include topics such as open finance, green fintech, AI and DLT. The measures include the review of the current legal and supervisory framework considering new players on the market, including analysis of existing licence categories and examination of alternative regulation options such as self-regulation and private certification. Furthermore, the potential for innovation in the use of AI is one of the topics that may lead to a need for action in the regulatory/legal framework in order to mitigate the risk of abuse.

5. Disputes

5.1 Judicial Decisions and Litigation

Despite being a significant blockchain and cryptocurrency market, until recently, there have been no Swiss court decisions interpreting the legal regime applicable to the use of blockchain.

However, in January 2024, the Swiss Federal Administrative Court (FAC) decided on a case involving, inter alia, the distinction of tokens pursuant to FINMA's categorisations (see **2.2. Categorisation**). In particular, the FAC held that utility tokens, which cannot be used as such at the time of their emission (ie, pre-functional tokens or voucher token), are generally to be categorised as asset tokens. If such tokens are standardised and transferrable (regardless potential transfer restrictions in the ICO documentation or de facto impediments to transferability), they qualify as securities and thus falling within the scope Swiss securities regulation.

5.2 Enforcement Actions

In 2023, FINMA carried out 210 investigations relating to the unauthorised acceptance of public deposits, including by fintech business models, and a total of 229 investigations. This number includes investigations into unauthorised financial intermediaries, lack of SRO affiliations and unauthorised fintech business models (separate data on the fintech sector was not provided by FINMA). FINMA's enforcement activities may, in particular, result in criminal reports to law enforcement agencies, activity bans, withdrawals of licences, the opening of bankruptcy proceedings or the publication of orders against institutions.

FINMA is willing to consistently take action against financial service providers in the fintech area that violate or circumvent supervisory laws, such as the banking, securities or anti-money laundering regulations.

The Dohrnii Foundation Case

In May 2023, FINMA concluded enforcement proceedings against the Dohrnii Foundation and its founder and former managing director personally. The Dohrnii Foundation and its founder launched an ICO in spring 2021 for a previously newly created token, the DHN Token, which was initially aimed at providing access to a learning platform as well as a marketplace where users should have bought cryptoservices and products from other users with the DHN Token. Based on this designated purpose, the DHN Token was intended to be classified as a utility token, which would not be subject to regulatory and licensing requirements.

FINMA applied its approach established in the ICO Guidelines concerning the classification of tokens, and concluded that the DHN Token could not be used for the purpose ascribed to

it and that, "as a pre-functional token, it served as an investment in advance". Due to the actual commercial function of the DHN Token, FINMA qualified the DHN Token as a hybrid token containing characteristics of all three possible token categories: utility tokens, asset tokens and payment tokens.

Correspondingly, FINMA decided that the issue of such DHN Token breached the following Swiss financial market law provisions.

- The Dohrnii Foundation unlawfully operated as a securities firm without the required FINMA licence, pursuant to the Swiss Financial Institutions Act, when selling the DHN tokens.
- The founder of the Dohrnii Foundation accepted funds totalling around CHF1.5 million from more than 20 investors, which were to be invested in the crypto sector and repaid with returns. This constituted unlawful banking activities without the required FINMA licence, pursuant to the Swiss Banking Act.
- The Dohrnii Foundation issued a token intended to be used as a means of payment on the Dohrnii platform (payment token). Hence, the Dohrnii Foundation acted as a financial intermediary without complying with the respective regulatory obligations established in the Swiss AMLA.
- In addition, the founder did not comply with the cease-and-desist order during the investigation, but continued his activities. Moreover, both the Dohrnii Foundation and the founder partially failed to comply with their duty to provide information to FINMA during the investigation.

The Dohrnii Foundation case clearly evidences FINMA's substance-over-form approach and confirms that, when reviewing tokens, FINMA does not primarily rely on the formal structure, but rather analyses the commercial function of tokens.

6. Tax

6.1 Tax Regime

As of April 2024, neither a digital service tax nor any other specific tax legislation applicable to blockchain-based business models or the use of cryptocurrencies has been or is expected to be introduced in Switzerland; also, tax laws are, in principle, applied on a technology neutral basis.

Federal Council Report on the Adaptation of Swiss Tax Law

A June 2020 report on a possible need to adapt tax law to developments in the technology of distributed electronic registers (DLT/blockchain) made the following recommendations to the Federal Council.

- The current VAT law provides the necessary framework to also record facts based on distributed electronic registers; the current tax law has also proven itself for income, profit, wealth and capital taxes, so there is no apparent need for legislative action in this area.
- In terms of withholding tax, it could be argued that the strong ability of equity and participation tokens to circulate and be traded on the capital market, as well as their hedging purpose, should lead to the levying of withholding tax on their proceeds. An extension of the object of the withholding tax to the proceeds of investment tokens would therefore be justified from a tax system perspective. However, due to the negative effects on the attractiveness of Switzerland as a business location, it is recommended that the levying of withholding tax according to the debtor principle

or according to the paying agent principle should not be extended to the earnings of all investment tokens.
- Technological developments and the ongoing revision of securities law are expected to have an impact on securities trading and thus also on the turnover tax. Due to the uncertainties regarding the type and scope of the future use of DLT trading systems, it is recommended – also in the interest of maintaining Switzerland's attractiveness as a business location – to refrain from making any legislative adjustments regarding the turnover tax at this time.

In view of the above, existing tax laws apply to crypto business models and blockchain-based services. For example, transactions with crypto-assets will usually be beyond the scope of Swiss transfer taxes. If, however, an asset-backed token qualifies as a "bond-like" instrument as defined in Swiss tax practice, the trading of such an asset token can trigger Swiss securities transfer tax if a Swiss securities dealer (as defined in Swiss tax law) is involved as a party or intermediary in the transaction.

Tax Classification

The Swiss Federal Tax Administration issued a working paper for the first time on 27 August 2019 (updated on 14 December 2021) regarding the treatment of cryptocurrencies and other coins or tokens based on blockchain technology for Swiss income, withholding and stamp tax purposes, clarifying the most important tax uncertainties. For the specific tax treatment, this working paper distinguishes between native/payment tokens, asset(-backed) tokens and utility tokens. While this Swiss tax classification is based on the same principles as the classification for Swiss financial market regulation purposes (see **2.2 Categorisation**), the Swiss tax authorities conduct their own analysis and classification, which is not necessarily in line with that of FINMA. The working paper also clarifies that tokens are generally considered as assets that are subject to net wealth taxes imposed by the Swiss cantons and municipalities. Some cantonal tax authorities have also issued guidelines clarifying the tax treatment of crypto-assets based on the general tax legislation.

VAT

While the use of payment tokens is treated in the same manner as the use of fiat currency, the transfer of asset tokens and utility tokens is generally considered as a supply for VAT purposes. Trading with payment tokens or asset tokens is generally exempt from VAT. By contrast, the transfer of utility tokens is considered a taxable supply for VAT purposes, resulting in Swiss VAT if the place of supply is in Switzerland and no specific exemption applies.

While the above distinction in the VAT treatment still applies, in September 2023, the FAT has revised its practice regarding the classification of native tokens with governance functionality for VAT purposes. Henceforth, the FAT distinguishes such tokens as to whether the governance function is of a merely ancillary function and the token can be otherwise qualified as a means of payment or as a voucher of value; or whether the governance function is the primary function of the token. In the former case, the VAT treatment of such token follows the treatment of a payment token, meaning that a transfer is not considered as taxable supply and thus not subject to VAT. However, in the latter case, the token may be qualified as utility token and thus be subject to VAT.

It should be noted that such revised practice of the FAT is thus far only based on the FAT's

communication in individual cases and its published practice (ie, the above-mentioned working paper) has not yet been amended. Hence, the concise criteria for the distinction of native tokens according to their governance functionality remain somewhat ambiguous and each case must be carefully considered on a case-by-case basis.

The above-mentioned principles apply for ICOs: the VAT treatment of an issuance of crypto-assets depends on the characterisation thereof:

- the issuance of payment tokens is not considered a supply;
- the issuance of asset tokens is generally an exempt supply; and
- the issuance of utility tokens is considered a taxable supply if no specific exemption applies.

The proceeds from the sale of crypto-assets generally constitute income for the issuer, unless the asset sold is a debt instrument.

Tax Consequences

In sum, the possible tax consequences for the parties involved in cryptocurrency transactions must be analysed on a case-by-case basis under current federal and cantonal tax laws (and existing guidelines). Because the existing Swiss tax laws are applicable to crypto business models and blockchain-based services, the most significant uncertainty in terms of tax law remains the qualification of the token. Once the token has been assigned to a specific token category, the tax law impact may be determined based on the established laws and practice for this type of asset. It is generally possible to confirm the Swiss tax treatment in a binding advance tax ruling. For ICOs and other significant transactions, arranging a tax ruling is best practice.

7. Sustainability

7.1 ESG/Sustainable Finance Requirements

As far as any ESG/sustainable finance requirements are established in Switzerland, they also apply to companies operating with digital assets. FINMA's focus is currently on climate-related financial risks, seeking to specify the risk management requirements for institutions with regard to climate and other nature-related financial risks. For this purpose, in particular, FINMA is currently drafting a new FINMA circular on nature-related financial risks, which will apply to banks and insurance companies. This also applies to entities holding a banking licence that operate with digital assets. Moreover, the new Ordinance on mandatory climate disclosures for large companies, which came into effect on 1 January 2024, applies to public companies, banks and insurance companies with 500 or more employees and total assets of at least CHF20 million or turnover exceeding CHF40 million. This Ordinance mandates the implementation of recommendations from the Task Force on Climate-related Financial Disclosures (TCFD) by major Swiss corporations.

Public reporting not only encompasses the financial risks associated with climate-related activities but also necessitates addressing the impact of a company's business operations on the climate. Additionally, companies are required to outline their reduction targets for both direct and indirect greenhouse gas emissions and describe their implementation strategies.

8. Data Privacy and Protection

8.1 Data Privacy

The exercise of data subjects' rights is particularly demanding and subject to the general principles of Swiss civil law, notably the Federal Act on Data Protection, according to which data subjects have a legal right to information, rectification, revocation and deletion. The right to information entitles data subjects to request information from the data controller on whether data relating to them is being processed. The other rights of data subjects are essentially aimed at correcting false, incomplete and/or redundant data. Since public blockchains do not have a central control body and there is consequently no central person responsible for data protection, the enforcement of these rights (including the "right to be forgotten") is de facto impossible.

Therefore, blockchain-based solutions should ensure that the participants are well informed about the particularities of the blockchain. For example, if the person concerned consents to data processing before using a blockchain or blockchain-related product, the specific processing of that individual's data within the scope of such application and to the extent of that consent is not unlawful. Furthermore, "chameleon hash functions" may enable data on a blockchain to be deleted under certain conditions, or the storage of data off-chain, while limiting the on-chain data to hash values may address privacy issues appropriately and support compliance with applicable privacy laws. As a general rule, no clear data should be stored on the blockchain unless the data subject acts as their own controller.

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