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trol over their subsidiaries and independent contractors in order to ensure compliance with the duties and to minimize liability exposure under the Initiative. The outcomes described in (i) and (ii) are hardly in the interest of corporate social responsibility while the outcome described in (iii) may not be in the interest of the foreign local enterprise and the local market at large. In any event, the Initiative, if adopted, will likely change the way business is done by international groups with substantial Swiss presence – potentially also in ways which were not intended by its sponsors.

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Digital Assets – Proposed Amendments to the Legal and Regulatory Framework of Distributed Ledger Technology in Switzerland

Reference: CapLaw-2019-15

Switzerland targets adjustments of the existing legal and regulatory framework of distributed ledger technology (DLT). The Federal Council initiated consultation on proposed amendments to, *inter alia*, civil law (including securities law), insolvency law, financial market law, and anti-money laundering regulation on 22 March 2019. This article summarizes the key points of the suggested adjustments and analyses their potential impact on market participants. The content of the rules may still be subject to changes in the ongoing legislative process.

By Luca Bianchi / Fabio Andreotti

1) Introduction

In recent years, the blockchain and initial coin offering (ICO) industry has been subject to a very strong growth in Switzerland as well as globally (CapLaw-2016-47, 25 et seq.). As a consequence, regulators and legislators worldwide are in the process of solving two fundamental problems, namely: the ***regulatory mismatch*** between historically grown and, thus, outdated laws and innovative business models (***Problem 1***); and the ***lack of legal certainty*** for market participants caused thereby (***Problem 2***) (CapLaw-2017-02, 14; CapLaw-2016-31, 4). Solving these two problems increases the attractiveness of a country for the digital assets industry in a competitive international environment.

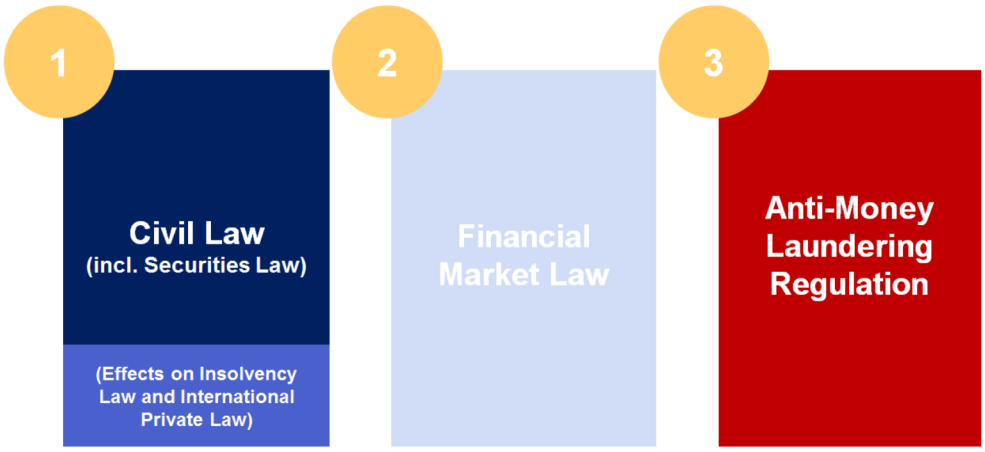
In this context, Switzerland has developed a pragmatic solution which suggests selective amendments to its existing laws. In particular, the Federal Council published a *Report on the Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland* on 14 December 2018 (the ***Report***). Subsequently, the Federal Council

proposed related adjustments of the legal and regulatory framework for digital assets based on an *Explanatory Report to the Consultation Preliminary Draft* (the ***Explanatory Report***) of the *Preliminary Draft Federal Law on the Adaptation of Federal Laws to Developments in Distributed Ledger Technology (DLT)* (the ***Preliminary Draft*** or ***PD***) of 22 March 2019.

An overview, the key points of the new rules, as well as their impact on market participants in Switzerland are briefly set out in this article. It is completed with a conclusion and an outlook.

2) Overview of the Proposed Amendments

The ***Swiss approach*** to digital assets legislation does not suggest a specific sector regulation or a blockchain law. Rather, ***targeted adjustments of existing laws and regulations*** have been proposed in the following areas:



The chart above shows the main legal areas (***civil law, financial market law, anti-money laundering regulation***) that will be subject to adjustments.

However, further (related) legal fields will be affected by the new legal and regulatory framework for digital assets. In particular, the intended approach in civil law triggers important related adjustments of ***insolvency law*** and ***international private law***.

Thus, the key points discussed below relate to all the legal fields set out above.

3) Key Points of the New Rules

a) Civil Law

The proposed adjustments of civil law (including securities law) comprise the following key points:

- ***Data ownership***: The Report and the Explanatory Report discuss the topic of data ownership, but do not propose the introduction of a general data ownership. Instead, selected changes to the treatment of digital data under specific laws are suggested (*e.g.*, in the area of insolvency law; see Section 3.b.).

- ***Classification of tokens by content***: FINMA has published its *ICO Guidelines for Enquiries regarding the Regulatory Framework for Initial Coin Offerings (ICOs)* on 16 February 2018. In this context, FINMA introduced a classification of tokens in the categories of payment, utility, and asset tokens (as well as hybrid tokens). The Report and the Explanatory Report refer to this classification by content as a meaningful tool under supervisory law.

- ***Classification of tokens by wrapper***: The Report and the Explanatory Report distinguish securities (*Wertpapiere*), uncertificated securities (*Wertrechte*) and intermediated securities (*Bucheffekten*). The legal qualification of tokens according to these categories is frequently unclear under current law. Thus, the introduction of amendments to securities law has been suggested (see next point).

- ***DLT uncertificated securities***: An innovative category of a legal wrapper for tokens shall be introduced: ***DLT uncertificated securities with securities character*** (***DLT uncertificated securities***; *DLT-Wertrechte*) (article 973d PD-CO). DLT uncertificated securities aim to ensure the effective and valid transfer of rights, proof of entitlement, and protection of *bona fide* transactions via a DLT register. The issue of rights as DLT uncertificated securities must be based on a ***registration agreement*** between the issuer and all other parties involved.

- ***Transfer of tokens***: The legal requirements for the valid transfer of tokens are controversially discussed under current law. In order to increase legal certainty, ownership of DLT uncertificated securities shall be ***legally transferable by adjusting the DLT register*** (article 973d PD-CO et seq.), *i.e.*, without the requirement of a written form for the assignment of a claim according to article 165 (1) CO.

- ***Tokenization***: Structuring of rights as DLT uncertificated securities shall be possible for ***all rights which have been suitable for securitization in the form of negotiable securities*** in the past. In particular, DLT uncertificated securities shall enable companies to tokenize their ***shares*** (*Aktien*) – which must be provided for in the articles of association (cf. article 622 (1) PD-CO) – or ***bonds*** (*Anleihen*) (article 973d PD-CO). Furthermore, ***contractual obligations*** (*vertragliche Ansprüche*) are mentioned as suitable for tokenization by the Explanatory Report, 29. This most notably includes ***claims*** (*Forderungen*). However, the tokenization of ***certain other assets*** (*e.g.*, ownership of movable or immovable property) may be subject to ***challenging legal questions, restrictions and limitations*** (Report, 52 et seq. and 64

et seq.; Explanatory Report, 29) which should be considered before launching a new token.

b) Insolvency Law

Following the approach chosen in the area of civil law, the following adjustments have been suggested for insolvency law:

- ***Segregation of digital assets in bankruptcies***: Effective segregation of tokens in the event of bankruptcy of a wallet provider is currently subject to legal uncertainties for the holder of such digital assets. Thus, the Federal Council has proposed a new provision stipulating a respective segregation right (article 242a PD-DEBA). This new provision shall, upon request of the beneficial owner, allow for the ***segregation of crypto-based means of payment and DLT uncertificated securities***, provided that the bankrupt wallet provider has the power of disposal over the assets on behalf of the beneficial owner and the assets can be assigned to the beneficial owner by way of the DLT register at any time. If assignment of the tokens to the beneficial owner is not possible, the tokens form part of the bankruptcy assets of the wallet provider.

- ***Access to data***: Furthermore, the Preliminary Draft stipulates a right of access to data stored with the bankrupt wallet provider (article 242b PD-DEBA). Such right may be relevant in cases where the customer wishes to transfer tokens out of a multi-signature wallet and, while the wallet provider ***does not have the power of disposal*** over the tokens – as compared to the cases pursuant to article 242a PD-DEBA –, the wallet provider does have ***effective access*** to the required private key(s).

- ***Special provision for banks***: In the case of a bank acting as a custodian, crypto-based assets deposited with such bank shall be subject to separation *ex officio* pursuant to article 37d PD-BA (article 16 (1bis) PD-BA).

c) International Private Law

Against the background of the proposed changes in civil law, a few related changes to international private law have been suggested:

- ***Applicable law for securitization and the transfer of claims***: A draft provision in the PD-PILA is concerned with the applicable law for the securitization and the transfer of claims, including DLT uncertificated securities (article 145a PD-PILA).

- ***Applicable law for pledging of claims and other rights***: Furthermore, a provision regarding the applicable law for the pledging of claims and other rights which are

securitized, including DLT uncertificated securities, shall be included (article 105 (2) PD-PILA).

d) Financial Market Law

The following key points are proposed by the Federal Council in the area of financial market law, respectively, financial market regulation:

- ***New license for DLT trading facilities***: A new regulatory category of a centralized financial market infrastructure, the DLT trading facility, shall be introduced in the FMIA (article 73a PD-FMIA). The license to operate a DLT trading facility shall allow for the ***non-discretionary, multilateral trading, settlement and clearing of DLT uncertificated securities and further DLT-based assets*** such as payment tokens (*e.g.*, Bitcoins) and utility tokens as well as the ***central custody*** of these digital assets. This new type of regulatory license should facilitate a variety of new business models.

- ***Organized Trading Facility (OTF)***: An establishment for the discretionary multilateral trading or bilateral trading of tokens that qualify as securities (*Effekten*) is considered an OTF within the meaning of the FMIA under current law (Report, 107; Explanatory Report, 47). Operators currently require a license as a bank, securities firm or trading venue (or recognition as a foreign trading venue). This is problematic according to the Federal Council because operators of such an establishment may not be able to obtain such a license without actually conducting the activities of a bank, securities firm or trading venue. To resolve this problem, persons seeking to operate an OTF ***for the sole purpose of the proprietary trading of tokens that qualify as securities*** (*e.g.*, asset tokens) shall be allowed to obtain a license as a securities firm under future regulation (article 41 (b) (3) PD-FinIA).

e) Anti-Money Laundering Regulation

The following key points have been proposed in the area of AML regulation:

- ***Financial intermediation***: DLT trading facilities shall be classified as financial intermediaries in terms of the AMLA and be obliged to comply with all due diligence obligations of the AMLA (article 2 (2) (d^{quater}) PD-AMLA). In addition, DLT trading facilities shall be subject to AML supervision by FINMA (article 12 (a) PD-AMLA).

- ***Payment tokens and decentralized trading platforms***: Changes to the AMLO are expected to explicitly consider (i) payment tokens that are issued in an ICO and (ii) decentralized trading platforms (provided that the underlying smart contract has power of disposal over third-party assets).

4) Impact on Market Participants

a) Opportunities

In a nutshell, the new legal and regulatory framework would allow for the following important (business) opportunities for market participants:

- ***Opportunity 1***: issuance of ***DLT uncertificated securities***;
- ***Opportunity 2***: obtaining the ***regulatory status of a DLT trading facility***.

b) Threats

Market participants may be subject to the following threats under the new – but also existing – legal framework for digital assets:

- ***Threat 1***: ***regulation*** in Switzerland (or, in case of cross-border activities, in other jurisdictions);
- ***Threat 2***: certain ***licensing*** (and/or ***prospectus [registration]***) ***duties***;
- ***Threat 3***: potentially ***invalid transfers*** of tokens (if legal requirements are not fulfilled);
- ***Threat 4***: failure to comply with ***AML regulation*** (where applicable);
- ***Threat 5***: regulatory and/or criminal sanctions in case of ***a breach of financial market laws*** in Switzerland (or abroad);
- ***Threat 6***: ***liability*** due to breaches of financial market law or civil law.

Regulatory threats for market participants are nothing out of the ordinary. However, overall awareness for such regulatory limitations has notably increased in the market in the last years. Thus, it should be clear by now that the entrepreneurial slogan *move fast and break things* may often be ill-suited for the regulated financial services and products industry if the above stated threats are not taken into consideration.

5) Conclusion and Outlook

The proposed amendments of the legal and regulatory framework for digital assets represent a prudent response of the legislator to the recent developments in the digital assets space. Certain aspects of the intended new rules can still be adjusted to the needs of the digital assets industry. It will be interesting to see whether and to what extent the suggested changes will receive criticism by market participants in the ongoing consultation which ends on 28 June 2019.

From today's perspective, the implementation of DLT uncertificated securities as well as the planned DLT trading facility license can be highlighted as very promising Swiss legal innovations. While Problems 1 and 2 as set out in the introduction above should overall be reduced by the planned amendments, issuers and service providers of digital assets must bear in mind possible adverse consequences due to a breach of regulatory or other legal provisions.

In this context, the upcoming entry into force of the new Financial Services Act (FinSA) and Financial Institutions Act (FinIA) in 2020 should be highlighted. The new laws and their implementing ordinances will likely impose additional legal burdens on the digital assets industry.

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Reporting of Beneficial Ownership in Unlisted Companies according to Article 697*j* CO – Some Open Points

Reference: CapLaw-2019-16

On July 1, 2015, new rules regarding reporting of beneficial owners of unlisted companies entered into force in Switzerland (for general remarks on the rules see CapLaw-2015-55). Even four years after their implementation, there are still a number of open questions in practice as regards the application of these rules, both from the perspective of the shareholders (subject to the obligation to report their beneficial owners(s)) and the companies (subject to the obligation to maintain a register of beneficial owners). One reason for these uncertainties is that the relevant provisions are incomplete and in many aspects leave room for interpretation. To date there is no case law that could provide guidance. A currently ongoing revision of the disclosure rules could bring some clarity.

By Alexander Wille / Lukas Held

1) Legal Basis

According to article 697*j* (1) Code of Obligations (CO), any person who alone or in concert with third parties acquires shares in a company whose shares are not listed on a stock exchange, and thus reaches or exceeds the threshold of 25% of the share capital or voting rights, must within one month give notice to the company of the name and the address of the natural person for whom it is ultimately acting (the beneficial owner). The notification obligation applies to the acquisition of bearer shares (*Inhaberaktien*) and registered shares (*Namenaktien*). Non-compliance with this provision has severe consequences: The membership rights (in particular voting rights) are