

ICOs in Switzerland

Regulatory framework – recent and future developments

Cryptocurrency Conference, Tel Aviv, April 26, 2018

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FINMA'S NEW GUIDANCE ON ICO (FEB 2018)

FINMA = supervisory authority in charge of overseeing

- Anti-money laundering (AML)
- Securities law issues
- Banking regulations (accepting deposits from the public)
- Collective investment schemes

FINMA guidance (February 2018), round table (March 2018)

- No unnecessary obstacles to innovative business models
- Principle-based, technology-neutral and competition-neutral regulation and supervision
- Transparency and legal clarity
- Zero tolerance of criminal behavior

ICOs

- Case-by-case analysis
- Possibility to seek rulings (no-action letters)

TOKEN CATEGORIES ACCORDING TO FINMA

Payment tokens (cryptocurrencies)

- Means of payment (value transfer)
- No rights against the issuer

Utility tokens

- Access right to digital use or services at point of issue

Asset tokens

- Claim or participation right against issuer or third party
- Similar to debt or equity

Hybrid forms are possible

Qualification may evolve over time

APPLICATION OF SECURITIES LAWS

Regulated securities = similar rights offered to > 20 pers.

- Payment tokens → **NO** (no right against issuer)
- Utility tokens,
 - **NO** if the token can be utilised (ready)
 - **YES** if token not yet available, and right to exchange
- Asset tokens → **YES**
- Presale and prefinancing → **YES**

Consequences

- Certain activities subject to FINMA authorization
 - Dealer
 - Licensing of trading venues and facilities
 - Underwriting and offering in professional capacity
- Prospectus requirements (if qualify as equity or bonds)

APPLICATION OF BANKING LAWS

Banking law

- Acceptance of deposits → banking license required
- Only if token has debt capital character (rare in ICOs)

APPLICATION OF ANTI-MONEY LAUNDERING LAWS

Financial intermediary

- Provide payment services, or issues or manages a means of payment
- Means of payment \neq two-party relationship (issuer/user)

Application

- Payment tokens \rightarrow YES
- Utility tokens \rightarrow only if token can be used as payment outside of the non-financial blockchain application
- Asset tokens \rightarrow NO
- Exchanges (see Payment21 – Moving Media GmbH)

Consequences

- Due diligence
- Reporting dubious cases
- Affiliation to self-regulatory organisation

SUMMARY

	Pre-financing and pre-sale / The token does not yet exist but the claims are tradeable	The token exists
ICO of payment tokens	= Securities ≠ subject to AMLA	≠ Securities = means of payment under AMLA ³
ICO of utility tokens ⁴		≠ Securities, if exclusively a functioning utility token = Securities, if also or only investment function ≠ means of payment under AMLA
ICO of asset tokens ⁴		= Securities ≠ means of payment under AMLA

Source: FINMA round
table, March 2018

CONSEQUENCES

FINMA ruling necessary for ICO

- Minimum information required for ruling request:
 - General information (company, founders, advisers, organizers)
 - Project description (timing, milestones, services, targeted investors & amount, organisation & planning, technologies, cryptocurrencies, use of proceeds)
 - Token issue (technical info, transfer to investors, timing of token availability, financial intermediary)
 - Transfer and secondary market

NEW FINTECH RULES IN SWITZERLAND

Funds may be accepted without licence if settled within 60 days

- Formerly 7 days
- Useful for crowdfunding platforms

Small deposits (sandbox) – no authorization needed if

- Max aggregate CHF 1 million (even if > 20 investors)
- No investment or remuneration of invested funds
- Clear indication that no FINMA supervision
- → Allows trying out a business model before having to seek authorization

Consultation project (new law contemplated)

- Aims at helping development of financial services outside normal banking business according to risk potential
 - Simplified authorization for entities accepting deposits until CHF 100 million, if they do not invest or pay interest on such deposits

PRACTICAL ASPECTS

- Finding a bank accepting to allow the cash out in fiat money
- Commercial registers in Switzerland admitted that capital increases could be made through contribution of crypto-currencies (contribution in kind)
- Global legal advice needed when ICO involves multiple jurisdictions
- Mind security of wallet during ICO
- In case of succession: how to get access to the wallet?
- Legal nature of crypto-currencies:
 - Asset capable of segregation in bankruptcy?
 - Protection of good-faith acquirer?

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