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PECULIARITIES OF LEGAL REGULATION OF CRYPTO ASSETS IN SWITZERLAND

M. I. Inozemtsev (a)*

*Corresponding author

(a) MGIMO University, 119454, Prospect Vernadsky, 76, Moscow, Russia, inozemtsev@inno.mgimo.ru

Abstract

The subject of this research covers peculiarities of legal regulation of crypto-assets in Switzerland as one of the friendliest jurisdictions for the development of crypto business. The purpose of this article is to review the current state and trends in the legalization of crypto-assets in Switzerland in the context of global trends in the crypto market regulation. The main research tasks are: analyze possible risks that arise during the issuance and turnover of crypto assets; consider existing classifications of digital assets; review the legal regulation in the area, etc. Special attention is paid by the author to issues of taxonomy and typology of crypto-assets, ICO requirements, as well as the development of civil legislation in the era of civil turnover digitalization. The methodology of the study comprises comparative, formal-legal and functional methods, systemic approach. The study of the modern state and trends of the legalization of crypto-assets in Switzerland, as well as in other advanced crypto-jurisdictions, has an undoubted theoretical and practical importance, as it allows forming the domestic doctrine of civil-law turnover of digital assets, and developing optimal legal regimes, adequate to the current market conditions, and awareness tools for creating models of legal regulation of digital assets in Russia.

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Keywords: Digital assets, digitized assets, token, crypto-asset, ICO, stablecoin.



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1. Introduction

One of the important trends in the evolution of civil legislation in both foreign countries and the Russian Federation is the legalization of objects and procedures based on digital technologies. The United States, Japan, Singapore, Australia, and Switzerland are among the leading jurisdictions that succeed in this area. Therefore, among national regulators, the most active today are the British (FCA, HMRC), Australian (ASIC), Swiss (FINMA), Singapore (MAS) and American (SEC, CFTC, IRS, FinCEN).

At the same time, it can be noted that countries that are not members of integration groups (such as the European Union / EU, the Eurasian Economic Union / EEU) quickly create FINTECH hubs and take the lead in the competition for attracting representatives of the crypto community to their jurisdiction. These include Switzerland, Liechtenstein, Great Britain in Western Europe, and Uzbekistan, Ukraine, Georgia, and Estonia in the former Soviet Union space.

In addition, the rivalry of Switzerland, Germany and Liechtenstein in the crypto market is of interest due to their common language, cultural, political and legal aspects. In Germany, after the adoption of the national Blockchain strategy, they already state that Germany should not leave Blockchain innovations for Switzerland and Liechtenstein, since today it is obvious that the latter two countries are not only ones of the world leaders in attracting investment in FINTECH startups, but also in terms of the pace and depth of the legalization of crypto business.

2. Problem Statement

The key theoretical aspects of the considered problematic are the taxonomy and typology of digital assets and, in particular, tokens. Moving towards a common understanding of the essence of regulated digital technologies (among national regulators) and forming common approaches to definitions and classifications are of practical importance for solving important tasks of transforming existing legislation into new regulatory objects and new types of activities.

3. Research Questions

The main issues of legal significance in the analyzed area are the following:

- What risks arise/increase during the issuance and turnover of crypto assets;
- Are digital assets a "new asset class", a subject to civil rights;
- How can digital assets/tokens be classified;
- Which types of tokens fall within the perimeter of the legal regulation;
- Is the existing regulation (modes, tools) sufficient for the emergence of new digital entities;
- What types of mediation in the crypto asset market need to adapt the existing legal regulation to them / create a new legal field.

Some of these aspects will be covered in this study in relation to Switzerland. The author believes that the study of the above mentioned aspects on the example of the leading crypto-jurisdictions of the world can help to evolve the domestic civil doctrine in the direction of developing an optimal model for

the legalization of digital technologies in the civil circulation. Significant changes in this direction can already be noted by Blazheev & Egorova (2020) and Karzchija (2019).

4. Purpose of the Study

The purpose of this research is to consider the current state and prospects in the sphere of legalization of crypto-assets in Switzerland under the influence of global trends in the crypto market regulation. The focus is made on issues of taxonomy and typology of crypto-assets, ICO requirements, as well as the civil legislation development in the digitalization era.

5. Research Methods

The methodology of the study comprises comparative, formal-legal and functional methods, systemic approach. The results of the study on problematic issues of crypto-assets regulation in Switzerland form the basis for developing a position on opportunities to adopt the foreign regulatory experience for creation of a legal regulation model for digital assets in Russia.

6. Findings

Legal regulation of turnover of crypto-assets in Switzerland has its own specific features, which in particular include the fact that at this stage, the regulation is mostly realized with soft law instruments (recommendations, guidelines, etc.), Switzerland also has a special legal regime of Crypto Valley Association in the canton of Zug, which, therefore, is a proving ground for testing financial innovations and regulatory approaches to them.

The main regulator of the Swiss crypto market is the Swiss Financial Market Supervisory Authority (hereinafter – FINMA), and the main document issued by it is the ICO Guidelines published on February 16, 2018 (FINMA, 2018). Taking into account the ICO-centric nature of the Swiss digital legislation, it is worth noting that currently only a few countries have separate ICO regulation – Switzerland, Liechtenstein, Bermudas, France, and the Republic of Belarus.

Important conceptual and methodological principles of the Swiss regulator are:

- Technological neutrality in the regulation, which indicates the possibility of applying existing legal norms, regardless of which technology is used;
- Focusing not on general approaches, but on each individual case, relying in the legal qualification of a transaction on the economic nature and purpose of the instrument used (the same approach is practiced by US regulators – SEC, CFTC).

The basic classification of tokens by national regulators is the division of tokens into 3 categories: exchange / payment tokens (they are also called crypto-currencies); utility tokens; security tokens (HM Treasury, 2018). This classification is followed by the British regulators FCA (2019), HMRC (2018), the European Union regulators EBA (2019), ESMA (ESMA, 2019). The latter ones sometimes use the concept of "investment token" instead of "security token".

With a few nuances, FINMA classifies tokens: the Swiss regulator allocates asset tokens together with payment and utility tokens.

Let's consider some specific features of these categories of tokens from the position of the Swiss regulator:

- Payment tokens (crypto-currencies). When conducting an ICO of payment tokens, FINMA requires compliance with anti-money laundering rules and does not consider such tokens as securities.
- Utility tokens are tokens designed to provide digital access to an application or service using a blockchain-based infrastructure. If a utility token functions fully or partially as an investment in economic terms, FINMA considers such tokens as securities (that is, in the same way as asset tokens).
- Assets tokens give a right to participate in the actual physical assets for a share in future revenues of a company or future capital flows. In terms of their economic functions, such tokens are similar to stocks, bonds, or derivatives. This means applying the requirements of securities law for trading such tokens, as well as the requirements of civil law in accordance with the Swiss Civil Code (1907) (for example, the requirements for registering a prospectus).

Asset tokens can be digital or digitized. According to the FINMA definition, asset tokens that represent intangible assets are *digital assets* because they exist exclusively in a computer system. Asset tokens that allow trading of physical assets on the Blockchain are digital representations of physical assets; therefore, they are *digitized assets* (FINMA, 2018). This division of tokens into digital (digital assets) and digitized (digitized assets) is supported by the American crypto community (American Bar Association, Derivatives and Futures Law Committee, Innovative Digital Products and Processes Subcommittee, & Jurisdiction Working Group, 2019). ICOS can also exist in hybrid forms of the above mentioned categories.

In addition to the natural and obvious focus in regulation on reducing the risk of money laundering and terrorist financing, the regulator notes that securities regulation is aimed at ensuring the situation when market participants can base their investment decisions on a reliable minimum set of information. Besides, trade should be fair, reliable and ensure effective price formation. Anyone who falls under the token asset category has to apply for a securities dealer license. The license will be issued if the startup meets the requirements for organizations, capital, reporting, and trading activities.

Nowadays, a decision is being made in Switzerland to regulate Blockchain technology more clearly from a legal and technical point of view. FINMA states that currently there are no special ICO rules, and there is no relevant case law or holistic legal doctrine. The regulator believes that clarity in relation to the basics of civil law will be crucial for the sustainable and successful implementation of this technology in Switzerland.

In December 2018, the Swiss Federal Council published a Report on the legal framework for Blockchain and distributed Ledger technology (DLT) in the financial sector (Federal Council, 2018). Among other things, the report showed that the current Swiss legal framework is already well suited to work with new technologies, including DLT, and that there is no need for fundamental adjustments to the Swiss legal framework, but there is still a need for individual adjustments (increasing legal certainty in civil law regarding the transfer of rights via digital registries, segregation of crypto assets in the event of

bankruptcy, etc.). In addition, according to the current civil law, it is still unclear whether contracts concluded using Blockchain technology are legally binding.

Additionally, to this report, on November 27, 2019, the Federal Council issued a press release on further improving the legal framework for DLT / Blockchain (The Federal Council, 2019b). Specific amendments to nine Federal laws covering both civil law and financial market legislation are proposed (they are expected to be considered in early 2020). The Swiss regulator pays special attention to *crypto-currencies*. At the same time, there is a restrained attitude towards them, as well as attempts to regulate the market of payment tokens.

The Swiss Federal Council and the country's national Bank are opposed to the legalization of crypto-currencies (Krupenchenkova, 2019), at the same time, although FINMA warns about the risks of Blockchain (FINMA, 2019c), it has issued an administrative guide on money transfers using Blockchain technologies and what measures to counter money laundering should be applied to them (FINMA, 2019a; Ivantsov, Sidorenko, Spasennikov, Berezkin, & Sukhodolov, 2019). Special attention should be paid to the problem of *stablecoins*. In relation to them, FINMA has issued an additional Supplement to the guidelines for enquiries regarding the regulatory framework for initial coin offerings (FINMA, 2019b). In the document published on September 11, 2019, FINMA confirmed that the Libra Association based in Geneva had asked the regulator to bring its operations in line with the requirements of the Swiss law. Spurred by Facebook's activity, FINMA has developed a classification of stablecoins, according to which stablecoin can be linked to the value of Fiat currencies, exchange-traded goods, real estate or securities (Girich, 2019; Sidorenko, 2020). This document is one of the most detailed studies on the essence and varieties of stablecoins. As for the state-owned stablecoins, or *CBDC* (central bank digital currencies), Switzerland does not remain aloof from the discussion on this issue at the level of regulators.

In the report on possibilities and risks of implementing crypto-franc (e-franc) (The Federal Council, 2019a), the Swiss Federal Council and the Swiss National Bank indicated their belief that the universally accessible digital currency of the Central Bank (universally accessible CBDC) will not bring additional benefits to the country. Instead, this will create new risks, especially related to the financial stability. However, the development of the Central Bank's digital currency, available only to financial market players, seems to be a more promising strategy. For example, a "wholesale token" issued by the Swiss National Bank (SNB) can help improve the efficiency of trading, payments, and securities management.

7. Conclusion

It can be stated that the legal regulation of the crypto assets turnover in Switzerland is gradually expanding to civil and financial legislation. Regulatory documents are becoming more and more conceptual. Regulators widely use the mechanism of consultations with representatives of the crypto market in order to more accurately configure the regulatory tools.

The regulation focuses on assets token and the ICO mechanism, while the turnover of traditional crypto-currencies (or payment tokens) is discouraged if they are not "loaded" with additional functionality (hybrid tokens) or are not tied (being stablecoins) to relatively stable assets.

Switzerland, following the Group of Seven, the financial stability board, the Financial Action Task Force (FATF), as well as countries such as China and Sweden, pays special attention to the problem of stablecoins, including digital money from Central banks.

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