

Consultation Launched to Amend Swiss Laws with View to DLT/Blockchain Technology

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After issuing a report at the end of 2018, the Swiss Federal Council recently initiated a consultation on amendments to several federal laws to accommodate the needs of businesses using DLT/Blockchain technology.

The consultation, which began on 22 March 2019, is part of a larger initiative by the Swiss government to take a leading, innovative and sustainable position on DLT/Blockchain. By addressing various issues identified in the Swiss Federal Council's report, the draft laws aim at increasing legal certainty, facilitating the application of the new technologies in business, and limiting the possibility of misuse.

The proposed amendments cover several federal laws and address three major topics:

Creation of DLT Securities

Currently, DLT-based assets such as security tokens, respectively asset tokens qualify as uncertificated securities (*Wertrechte*) pursuant to the Swiss Financial Market Supervisory Authority (FINMA) and the abovementioned report of the Swiss Federal Council. However, to transfer uncertificated securities a written declaration of assignment is required, which is normally not available for DLT-based assets. Even if there is a legal debate as to whether such requirement must be respected indeed, it thus remains uncertain whether transfers of DLT-based assets can be considered valid without a written declaration of assignment.

Against this background, the Swiss Federal Council proposes an amendment of the *Swiss Code of Obligations* to enable the legally secure transfer of DLT-based assets. A specific category of tokenised rights and financial instruments called "DLT securities" will be introduced, which have the characteristics of negotiable securities. Transferring these securities will be made possible by using decentralised registers, including blockchains.

Separation of DLT-based assets in bankruptcy proceedings

DLT-based assets are often stored with a third party. If such a custodian goes bankrupt, the circumstances under which DLT-based assets can be separated from the bankruptcy estate are unclear under current laws. In response, separating DLT-based assets in the event of bankruptcy shall be specifically regulated in the *Federal Law on Debt Collection and Bankruptcy*. And to bring the insolvency regime for banks in line, the Swiss Federal Council also proposes amendments to the *Swiss Banking Act*.

Creation of a new license for cryptocurrency exchanges

Another main amendment concerns the area of trading venues for tokens, respectively cryptocurrency exchanges. Under current law, the discretionary multilateral and the bilateral trading of security respectively asset tokens do not require a stand-alone license. Rather, banks, securities dealers, trading platforms and financial groups licensed by FINMA are allowed to conduct such trading.

In this regard, the Swiss Federal Council suggests an amendment of the *Swiss Financial Institutions Act* allowing market participants to obtain a securities dealer license for the sole purpose of operating discretionary multilateral and bilateral trading systems.

In order to facilitate the establishment of trading systems for DLT based assets, even an entirely new license category for so-called "DLT trading facilities" shall be created by amending the *Swiss Financial Market Infrastructure Act*. These facilities shall be entitled to offer regulated financial market players and private customers services in the areas of trading, clearing, settlement and custody of DLT-based assets.

Outlook

The proposed creation of DLT securities and the new license for DLT-trading facilities represent important steps to serve the needs of DLT/Blockchain businesses in Switzerland. These amendments could facilitate raising capital on the primary market through security token offerings, and enable issuers to trade their tokens on licensed exchanges on the secondary market. Furthermore, the market will undoubtedly appreciate the legal certainty provided by the proposed amendments addressing the bankruptcy of custodians of tokens.

The consultation phase for the draft laws ends in June 2019. If the legislation process runs smoothly, the new laws might enter into force already by the end of 2020. More information – including the draft laws and an explanatory report (available in German, French or Italian) – can be found under the following link: https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-74420.html

CMS will keep you posted on the developments. But for more information on the current and future laws in Switzerland and how they could affect your business, feel free to contact the following local CMS expert.

KEY CONTACTS



Matthias Kuert LL.M.

Associate, Zurich

+41 44 285 11 11

matthias.kuert@cms-vep.com