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NEWS

ICOS: SOME RECENT DEVELOPMENTS – WHAT COMPANIES NEED TO KNOW

In Switzerland as in its neighbouring countries, several initiatives aim at regulating crypto-currencies.

This Newsletter provides an update on the discussions of G20 Finance ministers and central bankers during their first meeting in 2018, as well as on the content of the guidelines published by the FINMA last February with respect to ICOs' regulation.

The technological revolution represented by cryptocurrency presents legal and regulatory major challenges, similar to those created by the advent of the Internet.

The regulation of cryptocurrency was a major topic of discussion among G20 finance ministers and central bankers at their first meeting of 2018, held in Buenos Aires on 19 and 20 March.

The markets were expecting the outcome of these discussions with great interest. It emerged from this meeting that the G20 nations and the central bankers want to regulate the cryptocurrency market. Some first proposals to this effect should be available next July.

A few weeks earlier, on 16 February, the Swiss Financial Market Supervisory Authority (FINMA) published its ICO guidelines on the issues of applicability of regulation on ICO, offering market players some criteria for the application of the rules governing financial markets to ICO.

First of all, the guidelines list the requirements for registration applications and provide a checklist of the minimum information to be provided to FINMA in connection with an application for registration, thus speeding up the examination process.

In this respect, it should be emphasized that no abstract assessment of the applicable financial market regulation is possible. FINMA can, therefore, only decide on specific requests.

More interestingly, the guidelines set out the principles for assessing applications and classify the categories of tokens, enshrining an approach based on their economic function. These categories - which are not mutually exclusive - are as follows: (i) payment tokens, i.e. so-called "pure" cryptocurrencies, accepted as conventional means of payment or used for the operation of a blockchain i.e for the transmission of funds and securities; (ii) utility tokens, i.e. tokens providing access to a digital use or service and based on a blockchain infrastructure, and (iii) investment tokens, a category comprising all tokens representing assets value.

The stake with classification is whether the tokens should be considered as securities under the Federal Capital Markets Infrastructure Act (FMIA). The guidelines are particularly useful in this respect as they indicate that FINMA does not treat payment tokens or utility tokens that only confer a right on the date of issue as securities.

In contrast, FINMA defines securities as investment tokens as well as utility tokens that have a partial or total investment purpose, for example those conferring shares in future company earnings or future capital flows. In this respect, it should be specified that investment tokens and utility tokens may be hybrid and are then qualified cumulatively as securities and means of payment. In the event of qualification as securities, the legal consequences follow from the laws governing the financial markets (FMIA and the Federal Stock Exchange Act in particular). For example, it is necessary to ensure that a prospectus is not required because of the issuance of shares (Art. 652a of the Swiss Code of Obligations (CO) in particular) or bonds (Art. 1156ff CO).

The guidelines also briefly explain the legal consequences of qualifying the issuance of tokens as deposits, the applicability of both the Federal Act on Collective Investment Schemes and the Anti-Money Laundering Act (AMLA), and

the legal consequences of the application of the latter. In this respect, the guidelines highlight that as long as the tokens can technically be transmitted through a blockchain mechanism, the issuance of payment tokens represents an issuance subject to the AMLA, as from the date of the ICO or later.

These guidelines are thus a welcome step forward in the absolute need to clarify the complex legal situation represented by ICO's operations and the qualification of tokens. However, many fundamental questions remain open, notably those concerning the qualification of these tokens under civil law, as well as the tax and accounting treatment of ICOs. There is no doubt that Swiss law will have to draw from current international developments – including those at G20 level – in order to ensure minimum harmonisation with the standards that will be established. Indeed, these tokens, by their very nature, are not sensitive to geographical legal restrictions. The adoption of the regulation governing intermediated securities in 2008 could serve as a precedent. Indeed, the legislative process was part of an international harmonisation effort.

THOMAS GOOSSENS
Attorney-at-Law, lic. iur., LL.M.
Partner

STÉPHANIE CHUFFART
Attorney-at-Law, Dr. iur., LL.M.
Managing Associate

BIANCHISCHWALD LLC
mail@bianchischwald.ch
bianchischwald.ch

GENEVA
5, rue Jacques-Balmat
P.O. Box 5839
CH-1211 Geneva 11
P +41 58 220 36 00
F +41 58 220 36 01

ZURICH
St. Annagasse 9
P.O. Box 1162
CH-8021 Zurich
P +41 58 220 37 00
F +41 58 220 37 01

LAUSANNE
12, avenue des Toises
P.O. Box 5410
CH-1002 Lausanne
P +41 58 220 36 70
F +41 58 220 36 71

BERN
Elfenstrasse 19
P.O. Box 133
CH-3000 Bern 15
P +41 58 220 37 70
F +41 58 220 37 71