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### New CSRC Regulations and Trends on GDR Offerings in Switzerland

Reference: CapLaw-2023-37

In June 2022, Switzerland witnessed the launch of the China-Switzerland Stock Connect Program, which provides Chinese companies with a streamlined pathway to access the Swiss capital markets through the issuance of so-called global depositary receipts ("GDRs") on SIX Swiss Exchange. Following a swift start, the success of the Program was tested after the Chinese Securities Regulatory Commission ("CSRC") announced its intention to introduce new rules for the overseas listing of securities by Chinese listed companies. During the first semester of 2023, a new set of rules came into effect which introduced a series of changes, the consequences of which are still being determined. However, as the impact of the new CSRC regulations continues to unfold, there are grounds for optimism with respect to the future of the GDR market in Switzerland.

*By Thiago Freixo Claro*

#### 1) Introduction: The New Regulatory Framework for the Issuance of GDRs in Switzerland

Amidst increasing expansion of Chinese companies into overseas markets, China has been continuously opening its capital markets and thereby offering foreign investors opportunities to get direct exposures to Chinese securities. On 28 July 2022, the much-anticipated China-Switzerland Stock Connect Program (the "Program") was launched in Switzerland with the participation of senior government representatives of China and Switzerland and representatives of Shanghai Stock Exchange, Shenzhen Stock Exchange and SIX Swiss Exchange ("SIX"). The Program provides Chinese companies with a gateway to access the Swiss capital markets through the issuance of global depositary receipts on SIX. Global depositary receipts, or GDRs, are negotiable certificates issued by a depositary bank representing an interest in a certain number of underlying A-shares of a Chinese company listed on the Shanghai or Shenzhen stock exchange ("PRC Company"). Holders of GDRs are entitled to indirectly exercise (through the depositary) the membership and economic rights attached to the underlying A-shares.

Upon the Program's launch, four GDR offerings simultaneously took place on SIX. Since then, fifteen Chinese issuers, nine in 2022 and six in 2023 (to date), have availed of the Program for a combined deal volume of 5.5 billion US dollars. These listings positioned SIX as one of the most active exchanges in Europe in 2022 and thus far in 2023.

In 2023, the CSRC introduced a set of rules establishing a new legal framework for offerings of PRC domestic companies outside of Mainland China ("Overseas Listing"), including offerings of GDRs, (the "New CSRC Regulations") to align and unify the requirements and regulatory systems for Overseas Listings.

On 17 February 2023, CSRC published the "*Trial Measures for the Administration of Overseas Offering and Listing of Securities by Domestic Companies*", along with certain ancillary guidelines aimed at implementing a uniform regime for the overseas offering of equity securities and the listing of PRC Companies. A few months later, on 16 May 2023, CSRC issued the "*Guidelines for the Application of Regulatory Rules - Overseas Offering and Listing No. 6: Guidelines for Overseas Issuance of Global Depositary Receipts by Domestic Listed Companies*" (the "GDR Guidelines"), setting out specific rules applicable to the overseas offering of GDRs.

Based on the new CSRC rules and GDR Guidelines, each of the Shanghai and the Shenzhen Stock Exchanges released on 18 July 2023 their revised "*Interim Measures for the Listing and Trading of Depositary Receipts under the Stock Connect Scheme between Shanghai/Shenzhen Stock Exchanges and Overseas Stock Exchanges*" (the "Interim Measures"), providing further rules with respect to the listing, trading, cross-border conversion, and disclosure information of GDRs convertible into domestic underlying A-shares.

The practical implementations of the New CSRC Regulations are expected to be subject to further guidance from the relevant regulators, including the CSRC, and the Shanghai and Shenzhen stock exchanges.

## 2) What is new?

The New CSRC Regulations introduce a number of technical changes to the process of carrying out a GDR offering. These changes impact the following areas:

- **Sponsorship:** new obligations have been placed on the issuer to engage an onshore (i.e. PRC) sponsor;
- **Registration and filing requirements:** new procedures for filing and reviewing registration applications apply, including, notably, a requirement for the relevant onshore stock exchange (i.e. Shanghai or Shenzhen stock exchange) to review the registration application;
- **Offering intervals:** there is now a minimum time span between offerings that must be adhered to;
- **Use of proceeds:** issuers are required to use the proceeds from the GDR offering in accordance with specific regulatory guidelines; and
- **Disclosure and documentation:** issuers are now required to submit a series of additional documents and comply with additional disclosure requirements.

For a period in early- to mid-2023, new GDR offerings in Switzerland slowed down as issuers anticipated the introduction of new rules by the CSRC. Now that the New

CSRC Regulations have been published, issuers and transaction advisors alike are taking the opportunity to assess the impact of the changes and how they will affect future GDR offerings under the China-Switzerland Stock Connect Program. Nevertheless, the GDR market in Switzerland proved to be resilient, with six GDR offerings taking place in 2023 thus far, two of which after the publication of the GDR Guidelines last May, for a combined deal volume of USD 1.8 billion.

### 3) Conclusion: What is next?

Since the inception of the Program, the China-Switzerland Stock Connect Program has been able to attract more PRC Companies listing GDRs overseas than any other offshore jurisdiction. In the first year of the China-Switzerland Stock Connect Program, fifteen PRC Companies listed GDRs on SIX, roughly three times the number of PRC Companies listed in London (where the same type of stock connect program was launched already back in 2019). We believe this demonstrates the attractiveness of the Swiss capital markets for PRC Companies, as well as the efficacy of the China-Switzerland Stock Connect Program. The relatively high number of GDR offerings in Switzerland has also bolstered the Swiss capital markets over a period that has otherwise seen relatively limited activity by traditional issuers.

While the full impact of the New CSRC Regulations on the Swiss market remains to be fully realized, there are compelling reasons to expect that the Swiss capital markets will remain attractive for GDR offerings under the China-Switzerland Stock Connect Program. The stage is set for the GDR market in Switzerland to reinvigorate and flourish even further.

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## Crypto Markets: Regulators Worldwide Are Sharpening Their Knives

Reference: CapLaw-2023-38

The long-held myth of crypto markets benefitting from a "legal vacuum" has recently been dismantled once and for all. Whereas the EU has adopted a regulation for markets in crypto-assets (MiCAR), international standard-setters such as the FATF, the FSB, BCBS and IOSCO have issued a series of far-reaching recommendations that are now to be implemented worldwide. Given these significant regulatory headwinds, the crypto industry will inevitably have to go through a process of maturation and consolidation.

*By Franca Contratto*

## 1) Background

After a long period of meteoric rises in market capitalization, the year 2022 brought a rude awakening to crypto markets and everyone who believed in them. The digital gold-rush fever which had led one in five adults in the United States and one in ten in Europe investing in crypto-assets, has definitely faded away. Following a series of scams and collapses of large-scale crypto firms and millions of losses suffered by countless investors around the world, trust in large parts of the crypto ecosystem is broken.

Against this backdrop, it comes as no surprise that regulators and other authorities around the world have now drastically tightened the thumbscrew. While spectacular enforcement actions against high-profile firms such as FTX, Coinbase or Binance generated a lot of media coverage (see also THOMAS WERLEN/SIMON WEBER, Switzerland's Quest for a Safe Haven for Crypto Products, CapLaw 4/2023, p 9 et seqq.), the paradigmatic changes in the global regulatory landscape went largely unnoticed by the public so far. Quite wrongly, because the impact of this regulatory overhaul will undoubtedly have far-reaching consequences and permanently reshape the future structure of markets and business models.

This contribution traces the main lines of development in the global crypto regulation landscape. Due to its importance for the Swiss crypto industry, the focus is clearly on the European regulatory framework for crypto-assets (MiCAR). In addition, the most significant recommendations of international standard-setters are briefly presented; even if they are non-binding in nature their importance for the future regulatory development should not be underestimated. Last but not least, a brief assessment of the current state of implementation of crypto-related regulations in the major financial centers concludes this overview.

## 2) European Union: Markets in Crypto-Assets Regulation (MiCAR)

On 29 June 2023 the Markets in Crypto-assets Regulation (EU-Regulation No. 2023/1114, MiCAR) entered into force. It will in large parts be directly effective in all EU member states and shall be applied from 30 December 2024 (Art. 149 (2) MiCAR). Given its very broad scope and its considerable level of regulatory detail, MiCAR is perceived as a landmark regulation whose impact on markets is likely to be comparable to the MiFID II/MiFIR-package:

- **Products in scope (Art. 3 (1) no. 6-9 MiCAR):** MiCAR is applicable to (1) asset-referenced tokens (ART) aiming to maintain a stable value by referencing other assets or fiat currencies, (2) electronic money tokens (EMT) which are used as payment tokens and have been backed by fiat currency which is a legal tender, and (3) a number of other crypto-assets, such as utility tokens. Central bank digital currencies (CB-CDs), non-fungible token (NFTs) and decentralised finance protocols (DeFi), however, are out of MiCAR's scope. Security token and derivatives on crypto-assets qualify as

financial instruments (Art. 4 (1) no. 15) and, therefore, fall under the amended provisions of MiFID II exclusively.

- **Firms, respectively, services in scope (Art. 3 (1) no. 11-26):** MiCAR introduces a comprehensive regulatory framework for both crypto-asset issuers (CAIs) and for crypto-asset service providers (CASPs). Services provided by CASPs encompass (among others) custody and administration of crypto-assets on behalf of third-parties, exchanging crypto-assets for funds (i.e. fiat and other currencies), execution of orders for crypto-assets on behalf of third parties, any marketing on behalf of the issuer of crypto-assets ("placing") or providing advice as well as portfolio management on crypto-assets. Similar to MiFID II, MiCAR states a licensing requirement for the aforementioned services (Art. 59, 60 & 62 et seqq. MiCAR) and subjects CASPs to an extensive set of conduct of business rules. CAIs who offer crypto assets (other than ARTs or EMTs) to the general public or who request admission to trading on a platform are required to publish a whitepaper describing the technical features of the crypto asset (typically, a utility token), potential restrictions on its transferability, a brief description of the project and the legal entity responsible for the project, including information on the financial condition for the past three years. No whitepaper is, however, required where crypto-assets are created through mining, where an offering is made for free or if the offer is made to fewer than 150 persons per EU member state or addressed exclusively to qualified investors.

It is particularly noteworthy that MiCAR does not provide for a specific third country regime. Swiss providers wishing to advertise or actively promote crypto-related services to clients in the EU will have to fully comply with EU licensing requirements as well as with the respective regulatory duties. Non-EU based CASPs will only avoid falling under MiCAR in cases where the requirements of the "reverse solicitation"-exemption are met (Art. 61MiCAR).

### 3) International Standard-Setters

#### a) BCBS: Prudential Standard for Banks' Exposures to Crypto-assets

Recent market developments have shown that the global banking system is increasingly exposed to crypto-assets, given that a growing number of banks act as custodians of crypto-assets or as stablecoin issuers. On 16 December 2022, the Basel Committee on Banking Supervision (BCBS) endorsed a new crypto-related prudential standard for banks in order to mitigate potential risks to financial stability. The scope of the standard is relatively large as it covers not only unbacked crypto-assets but also tokenised traditional assets and stablecoins. The classification is nevertheless of great importance and will probably challenge banks and their auditors in its daily application as capital requirements vary, with unbacked crypto-assets being subject to most conservative capital treatment. Apart from capital adequacy, the usual requirements regarding liquidity, leverage ratio, large exposures, operational risk, supervisory review

and disclosure have to be met. The crypto-related global minimal standard will be incorporated as new chapter of the consolidated Basel framework and has to be implemented in national legislation by 1 January 2025. Consistency and timeliness of the transposition into domestic regulation will be monitored based on the so-called Regulatory Consistency Assessment Program (RCAP).

### **b) FSB: Global Regulatory Framework for Crypto-asset Activities**

Based on a mandate of the G20, the Financial Stability Board (FSB) has undertaken an in depth-review of potential threats to financial stability posed by global crypto-asset activities. On 17 July 2023, the FSB published two sets of high-level recommendations: While one of them focuses on global stablecoin arrangements, the other set relates to the regulation, supervision and oversight of crypto-asset activities in general. Given the increasing volume of crypto markets and their increasing interdependence with the financial system, the FSB's expectations are high: In essence, national authorities are expected to adopt comprehensive regulatory frameworks for crypto-asset activities thereby applying regulatory tools which are comparable to the ones which have long been established in traditional financial market supervision (e.g. licensing requirements, risk management frameworks, disclosure duties). Furthermore, member states are urged to increase their cooperation and coordinating efforts so as to eliminate regulatory arbitrage and to increase the consistency of the emerging regulatory framework for crypto markets. Member jurisdictions' implementation measures will be subject to review by the end of 2025.

### **c) IOSCO: Draft Policy Recommendations for Crypto and Digital Asset Markets**

The International Organization of Securities Commissions (IOSCO) recently hold a public consultation on its policy recommendations for crypto markets. IOSCO plans to finalize the standard by the end of December 2023. In terms of their content, many of the 18 proposals seem to be mirroring the conduct of business rules for CASPs as laid down in European MiCAR regulation (see paragraph 2 above). Nevertheless, IOSCO's policy work might provide highly useful to reach global consensus on a consistent regulatory framework, given that IOSCO is comprised of securities regulators from across the world and – among others – embedding key players from the US (CFTC, SEC) as well as from important financial centers in Asia-Pacific.

### **d) FATF: Targeted Update on Implementation of the FATF Standards on Virtual Assets and Virtual Asset Services Providers**

As early as 2019, the Financial Action Task Force (FATF) extended its anti-money laundering and counter-terrorist financing measures (AML/CFT) to crypto markets. A key AML/CFT measure is the so-called Travel Rule (FATF Recommendation 16) which applies to transfers from or to an external wallet belonging to a third party. The Travel Rule requires virtual asset services providers (VASPs) to share relevant

originator and beneficiary information alongside the transaction, i.e. to verify the identity of the third party as well as establish the identity of the beneficial owner and verify that the third party controls the external wallet. In June 2023, the FATF published an extensive report on member state compliance. The results are rather sobering: Of the 151 jurisdictions responding to the 2023 survey more than 50% have not yet even taken steps to implement the Travel Rule as specified above. Only as few as 25% of all member states were found to be fully compliant. Switzerland has introduced the Travel Rule as early as 2019 by an amendment to AMLO-FINMA.

#### **4) Overview on National Jurisdictions with a Focus on Leading Financial Centers**

As revealed in a comparative study published by PwC in December 2022 (<https://www.pwc.com/gx/en/about/new-ventures/global-crypto-regulation-report-2023.html>), only just over a dozen jurisdictions worldwide have so far enacted a comprehensive regulatory framework tailored to crypto assets (Bahamas, Bahrain, Cayman Islands, Estonia, France, Germany, Gibraltar, Liechtenstein, Hong Kong, Japan, Malaysia, Mauritius, Singapore, Switzerland, United Arab Emirates). However, regulatory projects are currently pending in various leading financial centers, such as the United Kingdom, Australia, Canada, Luxembourg, New Zealand and South Africa. The United States of America – home to the world's leading cryptocurrency markets – still fall behind internationally when it comes to specific crypto regulation: Crypto-specific legislation so far only exists scarcely and only at state level (e.g. in New York and California); therefore, federal crypto policies are still primarily shaped by enforcement cases led by the CFTC and the SEC. However, this may soon be changing: No less than seven crypto-related bills are about to be discussed in Congress over the coming months. Positive impetus for the future development of crypto markets is expected in particular from the Financial Innovation and Technology for the 21st Century Act and from the Clarity for Payment Stablecoins Act. However, heated debates are to be expected since after a long series of scandals the crypto skeptics in Congress have become rather numerous.

#### **5) Conclusion and Outlook**

The plethora of current regulatory initiatives on crypto markets marks a clear turning point: The days of free experimentation in a legal vacuum are definitely over. Policy makers around the world expect the crypto industry to finally grow up and leave the many teething problems behind. However, regulators and supervisors also face challenging times ahead: At the time being, we are still far away from the stringency and persuasiveness of a globally recognized regulatory framework such as the one created for the banking sector in the form of Basel III. On an international level, a period of reflection and consolidation of the great variety of regulatory approaches to tame crypto markets will be needed to avoid too many cooks spoiling the broth.

Switzerland, which has stood out internationally as a crypto regulation pioneer so far, cannot rest on its laurels. If Switzerland wants to position itself as an internationally recognized crypto hub in the long term, it must not only passively observe regulatory developments on an international level, but quickly act to close any emerging regulatory gaps. Especially in the area of stablecoins, where a convincing, clear Swiss regulation has been lacking so far, a window of opportunity is opening up that Switzerland should not miss.

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## Switzerland's Quest for a Safe Haven for Crypto Products

Reference: CapLaw-2023-39

Tokens such as cryptocurrencies have caused turmoil in the financial market. Regulators are trying to catch up on the latest developments and adapt 20th century legislation to match up with 21st century technology. In this context, the United States Securities and Exchange Commission ("**SEC**") has taken enforcement action against two cryptocurrency exchange platforms, Binance and Coinbase, in an attempt to clarify U.S. law applicable to tokens. The Swiss regulators have taken a more pragmatic approach. This article sets out the current situation in the U.S. and then turns to the legal regime in Switzerland.

*By Thomas Werlen / Simon Weber*

### 1) Overview

Lately, the crypto market has gained considerable attention of regulators worldwide (see also Franca Contratto, Crypto Markets: Regulators Worldwide Are Sharpending Their Knives, CapLaw 4/2023, p 4 et seqq.). In June 2023, the SEC commenced legal proceedings against two major cryptocurrencies exchange platforms: Binance Holding Ltd. ("**Binance**") and Coinbase Global Inc. ("**Coinbase**"). The SEC is accusing both exchange platforms of intentionally evading U.S. federal securities law. At the heart of these proceedings is the question whether specific digital assets such as tokens fall within the scope of the definition of a 'security' under U.S. law.

Whilst decisions are not expected anytime soon in said proceedings, recent developments in similar cases might give the exchange platforms a spark of hope. Indeed, on 13 July 2023, Ripple secured a partial victory in its court battle against the SEC: New York district judges ruled that the sale of cryptocurrency XRP on public exchanges does not violate securities law. However, the ruling states that the decision is based on a case by case analysis. In short, it does not clarify the question of what makes a digital asset a security.

Similarly, on 29 August 2023, U.S. asset management company Grayscale obtained a favourable decision against the SEC by the District of Columbia Circuit Court of Appeals. The Court held that the [SEC mistakenly rejected Grayscale's application](#) to convert the so-called 'Grayscale Bitcoin Trust' into an ETF.

Switzerland on the other hand, one of the biggest banking and finance hubs globally, decided to apply a different approach. To remain on the spearhead of innovation, it has continuously updated its regulatory framework to adapt to market innovations. Along the same lines, Switzerland has been proactively promoting the use of digital tokens to become a hub for digital token companies. The Canton of Zug is openly and actively promoting itself as 'Crypto Valley'. Ever since 2016, the city of Zug has accepted cryptocurrencies as a form of payment for [counsel and city taxes](#). Since its introduction, more than CHF 2 million in taxes have been [paid in Bitcoin or Ether](#).

This article sets out the current situation in the U.S. **(2)** and then turns to the legal regime in Switzerland **(3)**.

## 2) The U.S. approach

In the U.S. the SEC is at the forefront of the regulation of crypto currencies and digital token. Recently, it has been involved in various legal battles against businesses active in the sector. In particular, the SEC's enforcement actions against Coinbase and Binance stand out **(a)**. The crux of these enforcement actions is the definition of what constitutes a 'security' under the so-called Howey test **(b)**.

### a) The SEC's allegations

Whilst the SEC's accusations against Coinbase appear to be limited to the [offer and sale of securities](#), Binance is facing [more serious charges](#). The SEC accuses Binance not only of having offered and sold unregistered securities, but also of having artificially inflated its trading volumes and of having [diverted customer funds](#).

These SEC lawsuits bring back the burning question of whether the issuing of tokens qualifies as an [offering of securities](#). According to the SEC's chair, Gary Gensler, Bitcoin [cannot be characterised as a security](#). However, in his view, [all other cryptocurrencies can](#). This stands opposed to the former SEC director William Hinman's statement that another cryptocurrency, Ether ("**ETH**"), was [not a security](#).

Ultimately, the question will have to be answered by the U.S. courts.

### b) The Howey test

Under general U.S. law, Section 2(a)(1) of the U.S. Securities Act defines the term 'security'. This statutory definition has been further refined by the legal test established by the U.S. Supreme Court in the *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) case

("the **Howey test**"). According to the Howey test, the determination of whether assets are securities depends on three criteria. Regardless of its form, anything that:

1. represents an investment,
2. in a common enterprise,
3. with the expectation of profit solely through the effort of others

qualifies as a security.

However, the evolution of tokens and the ever-increasing trading options on various crypto-trading platforms has led to legal questions. The SEC, competent in all things U.S. securities, must determine whether such digital tokens fall within the scope of their tasks. These legal questions have prompted the SEC to commence legal action against two of the world's biggest crypto-trading platforms.

### 3) Crypto-regulation in Switzerland

In Switzerland the Financial Market Supervisory Authority ("**FINMA**") is facing similar challenges. However, FINMA is approaching the topic of new technology and digital tokens with an open mindset and has been described as "*one of the most proactive regulators of crypto assets*". It is putting considerable effort into implementing new regulations and issuing regulatory guidance to increase legal certainty. As such, Switzerland is aiming to position itself as a favourable crypto hub with a supportive regulatory environment and infrastructure.

The Swiss regulator FINMA is competent to supervise and regulate the Swiss financial market. If a token qualifies as a relevant asset traded on the Swiss financial market, it enters into FINMA's jurisdiction. This means that any FinTech company that plans to launch operations in Switzerland must ascertain whether they comply with authorisation, licensing, and anti-money laundering requirements.

There are five licences that are typically relevant for companies active in the digital asset field. These licences are issued by FINMA upon application and include the following: i) a banking licence, ii) a FinTech licence, iii) a securities firm licence, iv) a Distributed Ledger Technology "**DLT**" trading facility licence (see below for more information on the DLT licence), and v) an insurance licence.

Below, we address FINMA's categorisation of tokens (**a**)) before we move on to summarise Switzerland's legal framework (**b**)) and remind the reader of anti-money laundering provisions (**c**)).

### a) FINMA's categorisation of tokens

Generally, FINMA distinguishes between three categories of digital tokens: payment tokens, utility tokens, and asset tokens. Note that some tokens might have more purposes and/or characteristics (FINMA refers to such tokens as hybrid tokens). Hence, they might fall within several of the below categories.

**Payment tokens** are tokens that function as a means of payment or as a means of money or value transfer. This also means that the user does not have any claim against the issuer of the tokens.

**Utility tokens** are tokens designed for a specific use. For example, to provide access to a service or digital application.

**Asset tokens** are tokens that either represent an underlying asset or are economically a capital market instrument. They are hence similar to stocks, bonds, and derivatives. These tokens, if standardised and freely tradeable, constitute securities that fall within the scope of Swiss securities laws.

Depending on the type of token digital asset companies engage with, various regulations may apply, such as the Anti Money Laundering Act ("**AMLA**"), which sets forth obligations of financial intermediaries to prevent money laundering.

The Banking Act may also apply to issuers of tokens that qualify as deposits. Finally, the Financial Services Act applies to all public offering of securities, which might include tokens.

Identifying the type of token dealt with is therefore of vital importance to ensure compliance with the Swiss regulations.

### b) Switzerland's unique legislative framework: the DLT Act

In 2018, the Swiss Federal Council has already identified the need for improvement of the Swiss financial market law due to the never-ending development of new technologies and digital tokens.

A first draft of the new Act was published in 2019. In September 2020, the Swiss Parliament adopted the Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology ("**DLT Act**"), which amended several federal laws. DLT is a digital system used to record the transaction of assets by registering the existence of such transactions and their specific details in multiple places at the same time.

It allows shared data management and more particularly, shared accounting among participants who neither know nor trust each other's identity. The DLT Act entered into force on 1 August 2021.

The main innovation the DLT Act brings along is the introduction of a new form of uncertificated securities, in the Swiss Code of Obligations: registered uncertificated securities or "ledger based security". Uncertificated securities are formed through an agreement between the parties (a registration agreement), with rights registered, claimed, and transferred to others solely via a securities ledger that meets certain technical requirements.

Under the DLT Act, the transfer of registered uncertificated securities therefore no longer requires a written and signed cession of the security, which facilitates their transfer.

To accommodate the multilateral trading of these newly developed securities, a specific licence was introduced: the "**DLT licence**". These new licences are regulated by the Financial Market Infrastructure Act ("**FMIA**") and granted by FINMA.

Licensing as a DLT trading entity is required if the latter's purpose is either:

1. the simultaneous exchange of bids between several participants and the conclusion of contracts based on non-discretionary rules;
2. to hold DLT securities in central custody based on uniform roles and procedures; or
3. the clearance and settlement of transactions in DLT securities based on uniform rules and procedures.

It must be noted that to obtain this new licence, the DLT facility must be incorporated in Switzerland and have its registered head office in Switzerland. It is also advisable, and even recommended by FINMA, for companies applying for a licence to arrange a meeting with FINMA representatives to present their business projects and receive initial feedback before submitting any applications.

### **c) Anti-money laundering**

For the sake of completeness, note that under Swiss law, traders of digital assets must comply with the regulations set out by the AMLA. The AMLA has also been updated to now apply to DLT traders, which are considered as financial intermediaries under the anti-money laundering rules.

Exchange platforms therefore need to abide by anti-money laundering due diligence requirements set forth in the Act.

#### 4) Conclusion

Unlike the SEC, FINMA and the Swiss legislator are trying to create a safe haven for companies active in the field of digital assets. The adoption of a targeted and updated legislative framework aims at establishing an environment in which both the regulators as well as the users reach the highest potential in the world of digital assets.

Companies trading with digital tokens in Switzerland should not only make use of the current, liberal framework and the close contact with FINMA but also of the regulator's open ears for innovation and development.

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### Federal Council Submits Draft Legislation on the Introduction of a Public Liquidity Backstop (PLB) for Systemically Important Banks to the Swiss Parliament

Reference: CapLaw-2023-40

*By Benjamin Leisinger / Daniel Hulmann*

At its meeting on 6 September 2023, the Swiss Federal Council adopted the dispatch on the introduction of a public liquidity backstop (PLB) for systemically important banks or banks that are a member of a systemically important financial group (such bank a SIB). A PLB is a government liquidity provision that only comes into play when, firstly, the SIB's own liquid assets are no longer sufficient to meet its financial obligations and, secondly, the options for the Swiss central bank (SNB) to provide liquidity assistance against collateral (in Switzerland, the ordinary intraday facility, the liquidity-shortage financing facility and the emergency liquidity assistance) have been exhausted. It is then possible for the SNB to provide additional liquidity which is guaranteed by the Federal Government as part of a restructuring of the affected SIB. The level of the guarantee is defined on a case-by-case basis depending on the circumstances. The draft legislation further explicitly clarifies that there is no legal entitlement to the granting of a guarantee by the Federal Government for liquidity assistance loans from the SNB.

The key parameters for a PLB to strengthen the stability of the financial sector had already been adopted by the Federal Council in 2022 and were subsequently implemented for a first time in March 2023 by the passing of an emergency ordinance as part of the takeover of Credit Suisse Group AG by UBS Group AG through a merger by absorption. The PLB and individual provisions of the emergency ordinance that are still required are now to be transferred into ordinary Swiss law.

The draft legislation provides for certain restrictions for a SIB that receives PLB, including a prohibition to pay dividends and, with the exception of the fulfillment of pre-existing ordinary interest, amortization and repayment obligations, the redemption of AT1 instruments, Tier 2 instruments or Bail-in bonds. An intentional violation of these restrictions would be subject to criminal sanctions (imprisonment for up to three years or a fine).

In contrast to the previous consultative draft, the draft legislation now provides for a "lump-sum compensation", which SIB must pay in advance to the Swiss Confederation. This lump sum is intended to compensate the Swiss Confederation for the risk and also to mitigate competitive distortions. The lump sum applies regardless of whether a PLB is ever granted to a SIB. A SIB incurs additional interest and premia if a PLB is actually granted to it.

A PLB is not a Swiss specialty but rather one of the standard international instruments for dealing with banking crises. For example, the United Kingdom, the United States, the EU, Japan and Canada, among others, have introduced a PLB or a similar instrument. The PLB or the availability of similar additional liquidity measures is said to increase the chances of success of a possible restructuring, or rescue, of a SIB, thus contributing to financial stability in Switzerland and internationally. Introducing such a tool into ordinary Swiss law would level the international playing field and put SIBs in Switzerland in a comparable situation to their foreign peers.

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## Spin-off and Listing of Sandoz

Reference: CapLaw-2023-41

On 4 October 2023, Novartis AG completed the spin-off of the Sandoz generics and biosimilars business, and Sandoz Group AG debuted as independent publicly traded company. The Sandoz shares were listed on SIX Swiss Exchange. The spin-off has been effected through a tax-neutral dividend-in-kind distribution of Sandoz shares to holders of Novartis shares and of Sandoz ADRs to holders of Novartis ADRs that that was previously approved by Novartis shareholders at an extraordinary general meeting. Sandoz is a European champion and a global leader in Generics and Biosimilars.

### Autoneum Rights Offering

Reference: CapLaw-2023-42

On 2 October 2023, Autoneum Holding AG, headquartered in Winterthur, Switzerland, and listed on SIX Swiss Exchange under the ticker symbol AUTN, completed its rights offering launched on 14 September 2023, with net proceeds of approximately CHF 100 million. The net proceeds will be used to partially repay the bridge loan which Autoneum entered into to provide financing for its acquisition of Borgers' automotive business. Autoneum is a global leader in acoustic and thermal management for vehicles. It operates 67 production facilities worldwide and employs around 16,600 people in 24 countries.

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### Vontobel's Issuance of AT1 Bonds

Reference: CapLaw-2023-43

Vontobel has successfully placed new Additional Tier 1 bonds (AT1 bonds) with a nominal value of USD 400 million in two tranches of USD 200 million and a denomination of USD 200,000 each with funds managed by Apollo Global Management. The issue price of the AT1 bonds is 100 percent and payment occurred on 28 September 2023. The AT1 bonds have an expected Baa2 rating from Moody's. Vontobel Holding AG is assigned an A2 issuer rating by Moody's.

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### Raiffeisen's Issuance of Senior Unsecured Bonds

Reference: CapLaw-2023-44

On 28 September 2023, Raiffeisen Schweiz Genossenschaft successfully completed its Bond issuance in the amount of CHF 100 million. The bonds are traded and will be formally listed on SIX Swiss Exchange.

### UBS's Issuance of Fixed Rate/Fixed Rate Callable Senior Notes under its Senior Debt Programme

Reference: CapLaw-2023-45

On 22 September 2023, UBS Group AG successfully completed its issuance of USD 1.25 billion in aggregate principal amount of Fixed Rate/Fixed Rate Callable Senior Notes due December 2027, USD 1.5 billion in aggregate principal amount of Fixed Rate/Fixed Rate Callable Senior Notes due September 2029 and USD 1.75 billion in aggregate principal amount of Fixed Rate/Fixed Rate Callable Senior Notes due September 2034 under its Senior Debt Programme. The Notes are bail-inable (TLAC) bonds that are eligible to count towards UBS Group AG's Swiss gone concern requirement.

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### Equinix's Inaugural Issuance of CHF Bonds

Reference: CapLaw-2023-46

On 12 September 2023, Equinix, Inc., a globally leading digital infrastructure company, successfully completed its inaugural Swiss issuance of CHF 300 m 2.875% bonds due in 2028. The Bonds were issued by Equinix Europe 1 Financing Corporation LLC and are fully guaranteed by Equinix, Inc. The offering of the Bonds was done by reliance on Regulation S under the U.S. Securities Act.

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### Nestlé's Issuance of USD Notes

Reference: CapLaw-2023-47

On 12 September 2023, Nestlé Holdings, Inc. successfully completed its issuance of USD 500 million 5.000% Notes due 2028, USD 500 million 5.000% Notes due 2030, and USD 500 million 5.000% Notes due 2033. The Notes are guaranteed by the Nestlé group's Swiss parent company Nestlé S.A. The offering of the Notes was done in reliance on Rule 144A and Regulation S under the U.S. Securities Act.

### Bond Issuance by Glarner Kantonalbank

Reference: CapLaw-2023-48

On 9 August 2023, Glarner Kantonalbank successfully completed its Bond issuance in the amount of CHF 110 m, traded on SIX Swiss Exchange.

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### NewGAME's Partial Tender Offer on GAM

Reference: CapLaw-2023-49

On 18 July 2023, NewGAME SA announced the launch of its partial cash tender offer for up to 28,000,000 shares of SIX-listed GAM Holding AG. NewGAME SA is part of the NewGAME-Bruellan investor group that holds a substantial stake in GAM. NewGAME is majority held by Rock Investment, a company controlled by Mr. Xavier Niel. The prospectus for the partial tender offer was published on 17 August 2023.

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### 17th Conference on Asset Management (17. Tagung zur Vermögensverwaltung)

Thursday, 9 November 2023, Metropol, Zurich

<https://www.eiz.uzh.ch/EIZ/web/eiz/event/Vermoegensverwaltung2023.aspx>

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### St. Gall Conference on Corporate Law (St.Galler Gesellschaftsrechtstag 2023)

Tuesday, 14 November 2023, SIX Convention Point, Zurich

[https://irphsg.ch/weiterbildung/tagungen/2020-2/gesellschaftsrechtstag\\_2023/](https://irphsg.ch/weiterbildung/tagungen/2020-2/gesellschaftsrechtstag_2023/)

### 10th Conference on Compliance in the Financial Services Industry (10. Tagung zur Compliance im Finanzdienstleistungsbereich)

Wednesday, 15 November 2023, Lake Side, Zurich

<https://www.eiz.uzh.ch/EIZ/web/eiz/event/ComplianceFinanz2023.aspx>

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### St. Gall Conference on Financial Markets Regulation (St.Galler Tagung zur Finanzmarktregulierung)

Thursday, 16 November 2023, Zürich Marriott Hotel, Zurich

<https://lam.unisg.ch/tagung/finanzmarktregulierung>

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### Capital Markets – Law and Transactions XIX (Kapitalmarkt – Recht und Transaktionen XIX)

Tuesday, 28 November 2023, Metropol, Zurich

<https://www.eiz.uzh.ch/EIZ/web/eiz/event/Kapitalmarkt2023.aspx>

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### Current Developments in Collective Investment Schemes Law 2023 (Aktuelle Entwicklungen im Recht der kollektiven Kapitalanlagen 2023)

Friday, 8 December 2023, SIX Convention Point, Zurich

[https://irphsg.ch/weiterbildung/tagungen/2020-2/kollektive-kapitalanlagen\\_2023/](https://irphsg.ch/weiterbildung/tagungen/2020-2/kollektive-kapitalanlagen_2023/)