

Legal questions across the scenarios

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Whatever scenario materialises, several legal questions will need answers. The first concerns the finality of settlement. In conventional systems, the moment at which a payment becomes irrevocable and unconditional is defined by law and by the rules of the system, in Switzerland through the Financial Market Infrastructure Act and in the European Union through the Settlement Finality Directive. On a distributed ledger, technical finality, which may be probabilistic on some public blockchains, must be aligned with legal finality. Cross-border transactions on a shared ledger raise the question of which law determines finality, a question that Project Jura identified and that remains open in many jurisdictions.¹

The second question concerns insolvency remoteness. Clients who hold tokenised securities or crypto-assets through a custodian need assurance that their assets are protected if the custodian fails. Swiss law has addressed this through the segregation of crypto-assets in bankruptcy under Article 242a of the Debt Enforcement and Bankruptcy Act. The protection depends, however, on the assets being attributable to the client at all times, which requires careful drafting of custody agreements and correct keeping of records. The insolvency of several crypto firms in 2022, including FTX, showed what happens when these conditions are not met. Under the GENIUS Act, holders of stablecoins enjoy priority in the insolvency of an issuer, and comparable rules may develop in other jurisdictions.²

The third question concerns ledger-based securities in cross-border transactions. The Swiss DLT Act created the ledger-based security under Swiss law, but a Swiss ledger-based security held by a client in Germany or traded on a platform in Singapore raises questions of private international law. Which law determines the validity of the transfer, the rights of a pledgee or the effect of an attachment? The Hague Securities Convention, which Switzerland has ratified, was designed for intermediated securities and does not answer these questions for tokens held directly by their

owners. UNIDROIT published its Principles on Digital Assets and Private Law in 2023, which offer guidance on the law applicable to digital assets and on their transfer, but they are a soft law instrument that national legislators must adopt.³

The fourth question concerns anti-money laundering in a tokenised world. Since 2019, the FATF has extended the travel rule to virtual asset service providers, a rule that Switzerland applies strictly, as described above. If tokenised money circulates widely on public ledgers and in self-hosted wallets, the travel rule will need to be adapted to new forms of transfer. The question of how far identification requirements should extend into peer-to-peer transfers will become pressing. Programmability offers new possibilities, such as the embedding of compliance checks into the token itself, but also new risks for privacy. Project Aurora suggests that collaborative analytics could improve detection, yet such analytics require a legal basis for sharing data across institutions and borders, which current data protection law often does not provide.⁴

The fifth question concerns tax reporting. The OECD's Crypto-Asset Reporting Framework, known as CARF, extends the automatic exchange of information to crypto-assets. It was approved by the OECD in 2022 and published in 2023 together with amendments to the Common Reporting Standard, which brought electronic money products and central bank digital currencies into its scope. Switzerland has decided to implement CARF and the amended CRS. According to the decisions of the Federal Council and Parliament, the rules are intended to enter into force on 1 January 2026, with the first exchange of data in 2027, while the list of partner states remains subject to a separate decision. Status to be verified. CARF will end the period in which crypto-assets held outside banks escaped the reporting regimes that Part E, Chapter IV described for conventional accounts.⁵

1 Notes

1. Art. 89 FinMIA (finality of settlement in payment and securities settlement systems); Directive 98/26/EC on settlement finality in payment and securities settlement systems, as amended; on legal finality on distributed ledgers, see CPMI, Distributed Ledger Technology in Payment, Clearing and Settlement: An Analytical Framework, February 2017. To be verified. ↩
2. Art. 242a SchKG; Art. 16 no. 1bis BankA (segregation of crypto-based assets held in custody by banks); on the insolvency of FTX (November

2022) and the treatment of client assets, see the reports of the court-appointed administrators. To be verified. ↩

3. Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, in force for Switzerland since 1 April 2017; Art. 145a PILA (law applicable to the transfer of rights by means of a security); UNIDROIT, Principles on Digital Assets and Private Law, adopted in May 2023. To be verified. ↩
4. FATF, Recommendation 15 and its Interpretive Note, as amended in June 2019; FATF, Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, October 2021; FATF targeted updates on the implementation of the travel rule (2022–2025). To be verified. ↩
5. OECD, International Standards for Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 update to the Common Reporting Standard, June 2023; Federal Council dispatch on the amendment of the Federal Act on the International Automatic Exchange of Information in Tax Matters (implementation of CARF and the amended CRS) and the subsequent parliamentary decisions. Dates and partner states to be verified. See Part E, Chapter IV. ↩

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