

Tokenisation, NFTs and crypto-assets and digital assets

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The newest chapter in the financialisation of art is tokenisation. A work can be held by a company whose shares are issued as tokens on a blockchain, which allows investors to acquire fractions of a painting and to trade them. Switzerland created a legal basis for such instruments with the Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology, in force since 2021. It introduced ledger-based securities into the Code of Obligations. FINMA had earlier published guidance on initial coin offerings that classifies tokens as payment, utility or asset tokens. Asset tokens representing fractions of a work of art will in many cases qualify as securities, with the consequences that follow under financial market law.¹

Non-fungible tokens (NFTs) raised a different question, because they often represent a digital work itself. Their market reached a peak in 2021, when an auction house sold a digital collage by the artist known as Beeple for about sixty-nine million US dollars. Turnover declined sharply in 2022 and 2023, as the *Art Basel and UBS Global Art Market Report* documented. Art Basel and several galleries experimented with digital art during this period. Under Swiss law, the qualification of an NFT depends on its function. An NFT that functions solely as a collectible is generally outside financial market regulation, whereas a token that promises a share of income or appreciation may be treated as a security.²

The money laundering risks of tokenised art combine those of the art market with those of crypto-assets and digital assets. Payments in crypto-assets and digital assets can obscure the origin of funds, while the pseudonymity of wallets can conceal the identity of buyers and sellers. Marketplaces with weak controls may also allow wash trading, in which parties buy works from themselves to inflate prices. Swiss law treats providers of services involving crypto-assets and digital assets as financial

intermediaries, which must apply the travel rule to transfers. The author's practice in the regulation of crypto-assets and digital assets suggests that a well-structured tokenisation can make art transactions more transparent, because a blockchain records every transfer.³ That record is only as reliable as the identification of the parties at its entry and exit points.

1 Notes

1. Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology of 25 September 2020 (DLT Act), in force in stages in 2021, introducing ledger-based securities (Art. 973d ff. CO); FINMA Guidance on initial coin offerings (16 February 2018). To be verified. ↩
2. On the sale of Beeple's *Everydays: The First 5000 Days* at Christie's in March 2021 for about USD 69 million and the subsequent development of the NFT market, see the Art Basel and UBS Global Art Market Report (editions 2022–2024); on the regulatory qualification of NFTs, see the publications of FINMA and the Swiss literature. Figures to be verified. ↩
3. On the money laundering risks of NFTs and tokenised art, see the FATF report (2023), cited above, and FATF, *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers* (October 2021); on the travel rule in Switzerland, see Art. 10 of the FINMA Anti-Money Laundering Ordinance. To be verified. ↩

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