

Banking law: deposits and custody

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The Banking Act prohibits persons who are not banks from accepting deposits from the public on a professional basis. Under the Banking Ordinance, a person accepts deposits professionally if it accepts more than twenty deposits from the public or advertises that it does so.¹ The question whether a crypto service provider accepts deposits arises whenever it holds crypto-assets for clients. If the assets are held in a way that the client has a claim against the provider for their return, and the assets are not kept separately for each client, the provider may be accepting deposits.

FINMA's practice distinguishes between custody and deposit-taking. A provider that keeps clients' crypto-assets separately, so that they can be attributed to each client at any time, is a custodian whose clients are protected in its bankruptcy and which does not take deposits. A provider that pools clients' crypto-assets in a collective wallet, without individual attribution, holds deposits if the clients' claims are for the return of fungible assets. The DLT Act clarified this line in insolvency law and in banking law, as Chapter II explains.²

Two instruments have made banking law more accessible to the crypto industry. Since 1 August 2017, a provider may accept public deposits of up to 1 million francs without a banking licence if it informs its clients that the deposits are not protected by the deposit guarantee, an exemption known as the sandbox. Since 1 January 2019, the Banking Act has provided for a licence for fintech companies, often called the banking licence light, which allows its holder to accept public deposits of up to 100 million francs, provided that it does not invest them or pay interest on them.³ The fintech licence has been granted to only a small number of companies, among them several with a crypto business model. Although its capital and organisational requirements are lighter than those of a full banking licence, its holders may not engage in lending funded by the deposits.

The crypto banks that received licences in 2019 hold full banking licences. They are subject to the same prudential and organisational rules as other banks, with additional requirements for the risks of crypto-assets. FINMA has required them to hold capital against their crypto positions, to manage the technological risks of custody and to apply the anti-money-laundering rules strictly. Established banks that offer crypto services, such as the Zuger Kantonalbank, are subject to the same requirements for that part of their business.

1 Notes

1. Banking Act (BankG, SR 952.0), Art. 1 para. 2: persons not subject to the Act may not accept public deposits on a professional basis; Banking Ordinance (BankV, SR 952.02), Art. 6 para. 1: professional activity means permanently accepting more than 20 public deposits (or crypto-based assets in collective custody) or publicly advertising for them (official text of fedlex.admin.ch, consulted via droit-bilingue.ch). ↩
2. Banking Act (SR 952.0), Art. 1b para. 1 and Art. 16 no. 1bis, and Banking Ordinance (SR 952.02), Art. 5a and Art. 6, each as amended by the DLT Act and the DLT Blanket Ordinance with effect from 1 August 2021 (AS 2021 33, 399; AS 2021 400), fedlex.admin.ch via droit-bilingue.ch: crypto-based assets count as custody assets if the institution undertakes to keep them available at all times and they are attributed to the client individually or to a community with each share ascertainable, while the professional acceptance of crypto-based assets in collective custody (Sammelverwahrung) is a licensable activity. FINMA Guidance 08/2023 "Staking", 20 December 2023, finma.ch, summarises this practice. ↩

3. Banking Ordinance (SR 952.02), Art. 6 para. 2: no professional activity where public deposits total at most CHF 1 million, no interest-margin business is conducted and depositors are informed in advance that the provider is not supervised by FINMA and that the deposits are not covered by deposit protection; version of the ordinance of 5 July 2017, in force since 1 August 2017 (AS 2017 3823). Banking Act (SR 952.0), Art. 1b para. 1: public deposits of up to CHF 100 million that are neither invested nor bear interest; inserted by the Financial Institutions Act of 15 June 2018, in force since 1 January 2019 (AS 2018 5247). Official text of fedlex.admin.ch, consulted via droit-bilingue.ch; see also FINMA, "FinTech licence", finma.ch. ↩

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