

Criminal law and crypto-assets

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Swiss criminal law protects crypto-assets and Digital Assets through its general provisions. The Swiss Criminal Code protects assets (Vermögen) against fraud, embezzlement, misappropriation and unauthorised access to data, which the courts have applied by treating crypto-assets as part of a person's assets. A person who deceives another into transferring Bitcoin commits fraud. A person who misappropriates crypto-assets entrusted to him commits criminal breach of trust or misappropriation. Money laundering under Article 305bis of the Criminal Code covers acts that frustrate the identification of the origin, the discovery or the confiscation of assets derived from a felony or an aggravated tax misdemeanour. Crypto-assets can be such assets.¹

The practical challenges lie in investigation and enforcement. Prosecutors must trace transactions on the blockchain, identify the persons behind the addresses and obtain control over the assets. The public prosecutors, including those of the canton of Zug and the Office of the Attorney General, need specialised expertise, analytical tools and the cooperation of the crypto exchanges that must respond to production orders. Seized crypto-assets must be kept safe during the proceedings. The Criminal Procedure Code allows assets with a market price to be realised early to preserve their value, although the Federal Supreme Court requires such a sale to be carried out with due care.² The author's practice in cross-border asset tracing shows how quickly crypto-assets can move between jurisdictions. Freezing orders are effective only when they reach an intermediary that holds the assets.

1 Notes

1. Case law; check in Swisslex or Weblaw: Federal Supreme Court and cantonal decisions applying Art. 146 StGB (fraud), Art. 138 StGB (misappropriation/criminal breach of trust), Art. 143 StGB

(unauthorised obtaining of data) and Art. 305bis StGB (money laundering) to crypto-assets (search terms "Bitcoin", "Kryptowährung", "Kryptowerte"). Confirmed so far only: Federal Supreme Court judgment 1B_59/2021 of 18 October 2021 (watson.ch, 18 November 2021) concerned crypto-assets seized as assets in a money-laundering investigation of the Zurich public prosecutor. ↩

2. Art. 266 para. 5 Criminal Procedure Code (SR 312.0), droit-bilingue.ch: objects subject to rapid depreciation and securities or other assets with a stock exchange or market price may be realised immediately under the SchKG. watson.ch, "«Hodl!» Staat darf beschlagnahmte Bitcoin nicht vorschnell verkaufen", 18 November 2021: Federal Supreme Court judgment 1B_59/2021 of 18 October 2021 (the Zurich public prosecutor may not convert seized crypto-assets hastily and must proceed with care, using external expertise where its own is lacking). ↩

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