

## Decentralised finance and the limits of regulation

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Decentralised finance poses a challenge to every regulatory regime. A protocol that allows users to lend, borrow and trade crypto-assets through smart contracts without an intermediary has no operator to license. Its developers may be spread across the world, with its governance lying with the holders of a token. Regulators have responded by looking for persons who exercise control over the protocol: developers who can change its code, companies that run its user interface, foundations that fund its development. MiCA excludes services provided in a fully decentralised manner from its scope without defining that term.<sup>1</sup>

Swiss law follows the same functional logic. FINMA examines whether a person provides a regulated service, whatever the degree of decentralisation claimed. A foundation in Zug that controls the user interface of a lending protocol and earns fees from it may be a financial intermediary, whereas a foundation that only funds the development of open-source software probably is not. The analysis depends on the facts and must be repeated when the protocol changes. Several decentralised finance projects in Zug have obtained legal opinions or rulings on these questions. The regulatory treatment of decentralised finance remains among the least settled areas of Swiss crypto law.

## 1 Notes

1. Regulation (EU) 2023/1114 (MiCA), recital 22: crypto-asset services provided in a fully decentralised manner without any intermediary do not fall within the scope of the Regulation; the term is not defined, eur-lex.europa.eu. ↩

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