

The principle of technology neutrality

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Swiss financial market law regulates activities and instruments by their economic function without asking which technology an institution uses. A deposit is a deposit whether it is booked in a traditional core banking system or on a blockchain. A security is a security whether it is represented by a paper certificate, an entry in a central securities depository or a token. FINMA has applied this principle consistently since its first statements on Bitcoin in 2014, summarising it in the phrase "same risks, same rules".¹

The principle has two consequences for the crypto industry. The first is that no activity is exempt from regulation merely because it takes place on a blockchain. A token that functions as a share is subject to the rules that govern shares, while a platform that holds clients' crypto-assets in a way that creates a claim against the platform may be taking deposits. The second consequence is that the crypto industry did not have to wait for a special law before it could operate, since projects could obtain legal certainty by analysing their activities under the existing laws and by asking FINMA for a ruling. That approach explains why Swiss crypto regulation developed through guidance and practice before it developed through legislation.

The principle also has limits, because some features of crypto-assets have no clear equivalent in traditional finance. A token held in a wallet whose private key only the holder controls is not a claim against any intermediary. A decentralised exchange has no operator in the ordinary sense. A stablecoin may combine features of a deposit, of a payment instrument and of a fund unit. For such cases, the application of the existing laws requires interpretation, with the legislator intervening where interpretation could not produce acceptable results. The DLT Act examined in Chapter II was the main intervention of this kind.

1 Notes

1. FINMA, "Supplement to the guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)", 11 September 2019, [finma.ch](https://www.finma.ch), section 2.1: the treatment of stablecoins focuses on economic function ("substance over form") and "follows the tried and tested principle of 'same risks, same rules'". The longer form "same business, same risks, same rules" does not appear in this document or in the ICO guidelines of 16 February 2018. ↩

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