

Tokens that are not securities

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The DLT Act did not regulate the private-law status of payment tokens and other tokens that do not represent a right against an issuer. A Bitcoin is neither a claim against anybody nor a ledger-based security. Swiss law does not classify it as a thing that can be owned in the sense of the Civil Code. Its legal nature is still debated in the literature. The prevailing view treats it as a factual asset whose holder has de facto control through the private key and is protected under the general rules of private and criminal law.¹ The Act nonetheless improved the position of holders of such tokens in practice. Article 242a of the Debt Enforcement and Bankruptcy Act applies to all crypto-based assets, including those that are not ledger-based securities, and thus protects holders of payment tokens held by a custodian in the custodian's bankruptcy. In criminal proceedings, crypto-assets have been seized as assets whose early realisation the Federal Supreme Court has made subject to requirements of due care.² The private-law gaps have therefore become less pressing, although they remain relevant in disputes about the ownership of tokens outside insolvency.

1 Notes

1. Federal Council, "Rechtliche Grundlagen für Distributed Ledger-Technologie und Blockchain in der Schweiz", report of 14 December 2018, p. 9, [newsd.admin.ch](https://www.admin.ch/newsd.admin.ch): according to the probably prevailing view, such tokens are purely factual, intangible assets for whose transfer civil law sets no requirements. ↩

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2. watson.ch, "«Hodl!» Staat darf beschlagnahmte Bitcoin nicht vorschnell verkaufen", 18 November 2021: Federal Supreme Court judgment 1B_59/2021 of 18 October 2021 (crypto-assets seized in a money-laundering investigation of the Zurich public prosecutor may be realised early only with due care and expertise). ↩

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