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The new Swiss blockchain/DLT laws and their implications on Swiss security token offerings

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I. Introduction (1/2)

- The new blockchain/DLT laws entail punctual amendments to ten existing Swiss legal statutes

- The overall goal is to accommodate the needs of blockchain/DLT ventures by creating greater legal security

- The main topics are:
  - Creation of uncertificated register securities
  - Specific rules on the segregation of crypto-based assets and access to data in insolvency situations
  - Creation of a new license category for DLT trading venues

I. Introduction (2/2)

– Swiss token categories
  - Payment tokens (cryptocurrencies)
  - Asset/security tokens
  - Utility tokens

– Focus of new blockchain/DLT laws
  - Asset/security token offerings
  - Legal instruments: Uncertificated register securities and DLT trading venues

II. Uncertificated Register Securities (1/3)

– The related rules are provided for in the Code of Obligations (**CO**), art. 973d et seqq.

– The rules entered into force on 1 February 2021

– Problem: Up to now, legal uncertainty around the question how rights can be represented on the blockchain ("tokenized") and whether they can be lawfully transferred without a written instrument

– Solution: Creation of uncertificated register securities:

  • Legally secure transfer of rights by way of an entry in decentralized registers, such as blockchains
  • No written instrument required

II. Uncertificated Register Securities (2/3)

– Pre-requisites for the creation of uncertificated register securities
  (art. 973d para. 1 CO):

  (i) Agreement between issuer and investor that the right to be tokenized shall be entered into and can only be claimed and transferred through a register (**Register Agreement**), which

  (ii) meets the requirements provided for in art. 973d para. 2 CO.

– Register Agreement:

  • Main content:

    (i) Clause that the right to be tokenized shall be entered into and can only be   claimed and transferred through a register (art. 973d para. 1 CO)

    (ii) description of the applicable requirements to transfer such right
        (art. 973f para. 1 CO)

  • Form: "Text form" (no wet signatures required; can be contained in general terms and conditions, e.g. the issuing conditions; etc.)

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III. Uncertificated Register Securities (3/3)

- Requirements concerning the register
  - The creditor, but not the debtor, has the power to dispose of the right secured through technical means (art. 973d para. 2 subpara. 1 CO)
  - Security standards providing protection against unauthorized changes by way of appropriate technical and organizational means (art. 973d para. 2 subpara. 2 CO)
  - The features of the tokenized rights, the Registration Agreement, and the operating principles of the register must be made available through the Register
    (art. 973d para. 2 subpara. 3 CO)
  - The creditors must be in a position to view the register entries and further information concerning them and to verify the integrity of the register, without the cooperation of the debtor (art. 973d para. 2 subpara. 4 CO)

- Further provisions: Legal effects (art. 973e CO); creation of collateral (art. 973g CO); cancellation (art. 973h CO); liability (art. 973i para. 2 CO); etc.

IV. Use case: Tokenization of Equity (1/2)

– Regulatory issues

- Collective investment scheme
  - o Definition: Assets raised from investors for collective investment purposes, managed for the account of such investors (art. 7 para. 1 Collective Investment Scheme Act (**CISA**))
  - o Main exceptions:
    - – Operating companies (art. 2 para. 2 lit. d CISA and art. 1b Collective Investment Scheme Ordinance)
    - – Holding companies (art. 2 para. 2 lit. e CISA)
    - – Stock corporation for qualified investors (art. 2 para. 3 CISA)

- Marketing of tokens
  - o Prospectus / exceptions (art. 35 et. seqq. Financial Services Act)
  - o Marketing abroad

IV. Use case: Tokenization of Equity (2/2)

– Corporate law / structuring considerations:

- Statutory basis (art. 622 para. 1 CO)
- Stock corporation <u>vs</u> limited liability company
- Shares with voting rights <u>vs</u>. participation rights
- Direct issuance to investors <u>vs</u>. sale (including "underwriting")

– Tax

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V. DLT trading venues (overview)

– New license category allowing for trading, in particular, uncertificated register securities on the secondary market / "counterpart" to the uncertificated register securities and their issuance on the primary market

– Highlights:

- May offer services in the areas of trading, clearing, settlement, and custody of crypto-based assets (i.e. the entire value chain)
- Investors may directly participate (no intermediaries)
- Licensing requirements are largely modelled on existing requirements for traditional trading venues / relaxed licensing requirements for "small DLT trading venues"

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Thank you!

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