TO THE ISSUE OF CLASSIFICATION OF VIRTUAL ASSETS IN FOREIGN COUNTRIES AND THE PROBLEM OF THEIR INTERNATIONAL AND NATIONAL REGULATORY DEFINITION

[1]GANNA VOIEVODINA, [2]VOLOSHYN YURII

National Aviation University, Faculty of International Relations, International law
E-mail: anna.v@manimama.eu

Abstract - This article is devoted to the study of the legal regulation of virtual assets in Switzerland. A broad analytical review of the current trends and development of the virtual assets market in Switzerland was conducted, in particular the level of acceptance of virtual assets as objects of legal regulation, the distribution of competences between different regulatory bodies, as well as the peculiarities of the regulation of different types of virtual assets. The results of this study will reveal the legal status of virtual assets in Switzerland, contribute to the development of the scientific and practical research base for the regulation of the virtual assets market.

Keywords - Virtual Assets, Legal Regulation, Token, Switzerland.

I. INTRODUCTION

In today's world, virtual assets are becoming increasingly common and important means of economic and financial activity. They represent a new type of asset that uses distributed ledger technologies and have the potential to significantly impact various aspects of the economy, finance, business and law. Virtual assets have their own unique features, such as decentralization, independence from traditional financial institutions, high speed and low transaction costs, as well as opportunities for use in international and global transactions. These features create new opportunities and challenges in terms of legal regulation of virtual assets.

Switzerland is one of the leading countries in the legal regulation of virtual assets. This is due to four reasons. First, Switzerland is known for its high reputation as an international financial center. The country has a developed financial system that includes many well-known banks, stock exchanges and financial institutions. Virtual assets have become an important part of the global financial system, so a study of the legal regulation of these assets in Switzerland can reflect current trends and approaches to regulation in the financial sector.
Secondly, Switzerland is known for its progressive and innovative approach to technology and business development. The country has a fairly loyal legislative approach to virtual assets, which promotes the development of various technological solutions and startups in the field of virtual assets. A study of the legal regulation of virtual assets in Switzerland can help identify and analyze these innovative approaches that may influence future regulatory decisions in the sector.

Thirdly, the national legislative system of Switzerland has its own special structure, in particular, the federal model of the state is taken into account, where the cantons have considerable autonomy in making decisions about their internal legislation. This may have an impact on the legal regulation of virtual assets, as different cantons may have different approaches to this issue. A study of the legal status of virtual assets in Switzerland can help clarify the diversity of regulatory approaches at the cantonal level and their interaction with the federal level.

In addition, Switzerland also has a fairly extensive practice of using virtual assets in various sectors. The study of the legal regulation of virtual assets in Switzerland can provide an opportunity to analyze the real experience of using these assets and evaluate the effectiveness and suitability of existing legal norms in a real business environment.

Analysis of recent research and publications The issues of regulation of virtual assets in Switzerland were dealt with by such European legal scholars as D. Kaitasa, K. Zellweger-Hütknecht, B. Zeiler, D. Zelich, N. Barosh, as well as domestic legal scholars, M. V. Pravdyuk, O. I Kulyk, V. M. Logoida. However, in domestic scientific literature there are no comprehensive studies on the legal analysis of the regulation of virtual assets in Switzerland.

The purpose of the study is an objective review of the current state of regulation of virtual assets in Switzerland and the determination of prospects for the development of the virtual assets market in the country.

II. THE MAIN MATERIAL

First of all, it is necessary to start with the legal definition of "virtual assets".

In Switzerland, the definition of virtual assets is given through the concept of "virtual currencies".

According to the Federal Council Report on virtual currencies, virtual currency is a digital representation of value that can be traded online, but it does not have the status of legal tender in Switzerland. Virtual currencies exist only in the form of a digital code and have no physical equivalent, such as coins or banknotes. Given the possibility of trading, virtual currencies are classified as assets [1].

The specified definition is also used by the Swiss Financial Market Supervisory Authority (hereinafter - "FINMA) in the amendments to the relevant anti-money laundering regulations. The term "virtual currency" is also mentioned in the Swiss Anti-Money Laundering Ordinance (hereinafter referred to as "AMLO") from January 1, 2016 [2].

In addition, FINMA also defines the term "crypto-assets". According to the May 1, 2022 Cryptoassets Guide of the same name, cryptoassets are digital assets that are typically recorded on a blockchain [3].

Many government analytical reports are devoted to the regulation of virtual assets in Switzerland, in particular the Report of the Federal Council of the Swiss Confederation "Legal framework for distributed ledger technology and blockchain in Switzerland. An overview with a focus on the financial sector" [4]. It indicates the importance of various pieces of legislation, interrelated in detail, in particular the Anti-Money Laundering Act (hereinafter referred to as the "AMLA") and the AMLO, in relation to the regulation of the crypto market in Switzerland and their impact on anti-money laundering [5].

Swiss law places virtual assets under a number of legal frameworks, including anti-money laundering, banking, collective investment schemes and financial services. Depending on the type of virtual assets, they may be regulated by various legislative acts, in particular:

1. The AMLA and related regulations define the obligations of financial intermediaries to prevent money laundering.
2. The Law "On Banking" applies to issuers of tokens that qualify as deposits [6].
3. The Law "On Collective Investment Schemes" applies to tokens that are secured by assets and received from investors for the purpose of collective investment [7].
4. The Law "On Financial Services" [8] and the Law "On Financial Institutions" [9] apply to all public offerings of securities, including tokens.

Such branching of the normative expression of legal regulation provides variability and the possibility of a more accurate approach to the understanding of virtual assets.

Thus, the Swiss legislator includes the concepts of "crypto-assets" and "tokens" in the category of virtual currencies.

In Switzerland, there are also state bodies that regulate the field of virtual assets (virtual currencies). The Swiss Financial Market Supervisory Authority (FINMA) is responsible for financial regulation in Switzerland. FINMA is an independent institution with its own legal entity located in Bern. It is institutionally, functionally and financially independent from the central federal administration and the Federal Department of Finance of Switzerland (Federal Tax Administration; hereinafter - "FTA") and reports directly to the Swiss Parliament. As the country's virtual asset regulator, FINMA sets rules and requirements for virtual asset servicing companies, including registration, anti-money laundering (AML) and counter-financing of terrorism (CFT) compliance.
One of the important aspects of the study is the definition of a virtual asset as a legal object in Switzerland. To the current date, Swiss courts have not issued a specific decision directly interpreting or establishing the applicability of Swiss law to the use of blockchain technology or cryptocurrencies.

However, Swiss regulators have clarified that existing laws, such as Swiss financial market laws [10], do apply to new technologies. An example of this clarification was the opening of enforcement proceedings in the bankruptcy case of Envion AG, which attracted attention. The Swiss Cantonal Court of Zug dissolved Envion AG on the basis of Article 731b paragraph 1 number 3 (Defects in the organization of the company) CO and subsequently ordered it to be wound up in a decision dated November 14, 2018.

The bankruptcy proceedings of Envion AG were conducted as ordinary bankruptcy proceedings under the supervision of the Zug Bankruptcy Office in accordance with the Federal Law on Debt Collection and Bankruptcy [11]. As part of this process, creditors were notified through a 'call to creditors' and more than 6,000 of them registered their claims on the online portal. In total, creditors filed for bankruptcy with more than 57 million tokens. This procedure emphasizes that Swiss courts and authorities apply the existing principles of Swiss civil law, judicial law and bankruptcy law to companies related to blockchain or cryptocurrencies in a broad sense.

The above really allows you to assess Switzerland as an international financial center of modern times, a progressive and innovative country, in particular, the Swiss Crypto Valley is one of the largest centers for the development of blockchain technologies and virtual assets in the world. The country has a detailed

system of regulatory and legal regulation. The construction of such regulation is related to the legislator's detailed understanding of the legal mechanisms, including the implementation of the supervisory authority, FINMA, the extensive legal framework and the unique approach to the regulation of virtual assets.

Another feature of the Swiss Confederation is the lack of application of the concept of Virtual Asset Service Providers (VASP) and a unique approach to combating money laundering. Instead of VASP status, companies that carry out operations with virtual assets receive the status of financial intermediaries if they meet one of the categories defined in the AMLA and AMLO laws.

A financial intermediary is considered to be any person that provides payment services or issues payment instruments, or manages them.

According to FINMA's current practice, the exchange of virtual assets for fiat currency or other virtual assets is governed by Article 2 paragraph 3 of the AMLA. The same applies to offering token transfer services if the service provider holds the private key.

The Swiss payment system is also automatically subject to the Anti-Money Laundering Act. The highest international anti-money laundering standards must be ensured throughout the project ecosystem. Such an ecosystem must be protected from increased money laundering risks.

According to FINMA, all additional services that increase the risks of the payment system must be subject to corresponding additional requirements. This means that all potential risks of the Swiss payment system, including banking risks, can be addressed by setting appropriate requirements in accordance with the principle of "same risks, same rules".

This principle is clearly described in a 2022 in article by Steven G. Cecchetti entitled “Same Function, Same Risks, Same Regulation”. The key thesis of this article is a quote from the General Manager of BIS, Agustin Carstens: "When banks and fintech companies compete for the same customers with similar services and taking similar risks, they should be regulated in the same way" [12].

This article undoubtedly describes its subject, where the author highlights the main concepts of regulators' approaches to risks. At the same time, Steven G. Cecchetti emphasizes that while encouraging innovation, one must beware of any damage it causes to the financial system [12].

A detailed classification of virtual assets in Switzerland should also be determined. This will make it possible to understand exactly how the country classifies virtual assets, and will help identify prospects for the further development of this market.

When classifying virtual assets, it is worth focusing on the classification of tokens, which are one of the components of virtual assets.

The regulatory act that regulates the classification of tokens in the Swiss Confederation is the Guide to the regulatory framework for the initial placement of tokens (hereinafter referred to as the "ICO Guidelines"), presented by the regulator FINMA [13].

According to the ICO Financial Market Regulation Guide, in particular regarding the conduct of Initial Coin Offerings (ICO) - the initial placement of tokens, is not applicable to all types of initial placement of tokens. Depending on the specific design of such accommodation, they may not be subject to regulation. The assessment of these circumstances should be carried out individually, taking into account the relevant factors [13].

FINMA classifies tokens issued as part of an initial token offering into three main types, with possible hybrid variants:

1. Payment tokens: these tokens are synonymous of cryptocurrencies, have no additional functions or links to other development projects. In some cases, such tokens may develop only to the required functionality and be used as a means of payment within a certain period of time.
2. Utility tokens: these tokens are designed to provide digital access to a specific application or service.
3. Security tokens (asset-backed tokens): These tokens include assets such as participation in real physical underlying assets, companies or income streams, or the right to receive dividends or interest payments. From an economic point of view, such tokens are similar to shares, bonds or derivatives.

The classifications of individual tokens are not mutually exclusive, so security tokens and service tokens can be classified as payment tokens in cases of hybrid models [13].

Security tokens. Regulation of security tokens is necessary to ensure that market participants can base their investment decisions, such as stocks or bonds, on a reliable and defined set of information. In addition, trading must be fair, reliable and ensure effective price formation. FINMA bases its decision on whether tokens qualify as security tokens on the following legal definitions:

- securities in the sense of the FMIA are standardized documentary or non-documentary securities, derivative and intermediary securities (Article 2, paragraph b of the FMIA) that are suitable for mass standardized trading, i.e. publicly offered for sale in the same structure and name or placed more than 20 clients, unless they were created specifically for individual counterparties (Article 2, paragraph 1 FMIA);
- non-documentary securities are defined as rights that, on the basis of a common legal basis (statute/issue conditions), are issued or established in large numbers and are generally identical. According to the Code of Obligations (hereinafter referred to as "CO"), the only formal requirement is to keep a journal in which information is recorded on the number and name of issued non-documentary securities and creditors (Article 973c, paragraph 3 CO) [14]. This can be done digitally on the blockchain.

Given that payment tokens are intended for use as a means of payment and do not have a similar function to traditional securities, FINMA does not consider payment tokens as securities (security tokens). This is in line with FINMA's current practice (e.g. for Bitcoin and Ethereum). If payment tokens were to be classified as security tokens under new case law or legislation, FINMA would revise its practice accordingly.

Utility token functions will not be considered as security tokens if their sole purpose is to grant digital access rights to an application or service, and if the utility tokens can actually be used in this way at the time of issue. In these cases, the main function is to grant access rights, and the connection to capital markets, which is a typical feature of security tokens, is absent. If a utility token has only an investment purpose (or the investment purpose is additional) at the time of issue, FINMA will consider such tokens as security tokens.

Tokens that are backed by assets are security tokens in accordance with article 2 paragraph b FMIA, if they are undocumented securities, as well as standardized and suitable for mass trading.

If FINMA recognizes that IPO tokens are security tokens, they are subject to the security token regulation. According to the Law "On stock exchanges" (Stock Exchange Act; hereinafter - "SESTA"), the accounting of self-issued non-documentary securities is almost not regulated, even if the non-documentary securities in question are classified as securities within the meaning of the FMIA [15]. The same applies to the public offering of security tokens to third parties. However, the creation and issuance of derivative financial instruments for the general consumer on the primary market is regulated according to the FMIA definition (Article 3, Clause 3 of the Ordinance "On Stock Exchanges" - "SESTO"). The underwriting and offering of tokens that are security tokens of third parties publicly in the primary market, if carried out in a professional capacity, is an activity subject to licensing (Article 3, Clause 2 SESTO).

Issuance of tokens is usually not associated with payment requirements to the organizer of the initial placement of tokens, so such tokens do not fall under the definition of a deposit. In this case, obtaining a banking license is not mandatory. However, if there are obligations in the nature of loan capital (for example, promises to return capital with a guaranteed income), the funds raised are treated as deposits and a license is required under the Banking Act, unless exemptions apply.
If the funds accepted as part of the initial placement of tokens are managed by third parties, such legal relations are governed by the provisions of the Law "On Collective Investment Schemes".

Anyone who provides payment services or issues means of payment or manages them is a financial intermediary subject to the Anti-Money Laundering Act (Article 2, Paragraph 3, Clause b AMLA). The issuance of payment tokens is the issuance of payment instruments subject to this rule, provided that the tokens can be transferred technically in the blockchain infrastructure.

In addition, FINMA published a separate instruction on the use of stablecoins [16].

The value of stablecoins is often tied to an underlying asset (such as a fiat currency). A common goal of such projects is to minimize the price fluctuations characteristic of currently available payment tokens. This, in turn, should increase market acceptance, particularly for payment purposes. The goal is to increase price stability compared to payment tokens.

The regulation of Swiss financial markets is principled and technologically neutral. FINMA's approach to stablecoins under supervisory legislation is in line with the existing approach to blockchain-based tokens: the focus is on the economic function and purpose of the token.

The above instruction indicates that in Switzerland such stablecoin projects are subject to the regulation of the financial market infrastructure. Each project will require a payment system license from FINMA based on the FMIA.

III. CONCLUSION

So, the above really allows you to evaluate Switzerland as an international financial center of

modern times, a progressive and innovative country, in particular, the Swiss Crypto Valley is one of the largest centers of development of blockchain technologies and cryptocurrencies in the world. The country has a detailed system of regulatory and legal regulation. The construction of such regulation is related to the legislator's detailed understanding of the legal mechanisms, including the implementation of the supervisory authority, FINMA, the extensive legal framework and the unique approach to the regulation of virtual assets. Switzerland's experience in regulating virtual assets can be extremely valuable for Ukraine, in establishing effective rules and mechanisms that will ensure stability, trust and protection of participants in the virtual assets market.

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