

Cryptocurrencies and DAO

What protection for the
« investors »?

TABLE DES MATIÈRES

1. Preliminary remarks
2. The protection of the creditor
3. The protection of the depositor
4. The protection of the investor
5. Conclusive remarks

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2.1 PROTECTION OF THE CREDITOR (1)

- Assumption



2.1 PROTECTION OF THE CREDITOR (2)

- **Question: how the creditor of the « payment » in BTC can enforce her/his rights?**
 - **Swiss Debt Collection and Bankruptcy Act? Other?**
- **Art. 38 para. 1 Swiss Debt Collection and Bankruptcy Act**
 - **Enforcement of money debt or securities granting is subject to the debt collection in the meaning of the SDBA.**
- **Subsequent question : what is BTC?**
 - **Is BTC « money » / legal tender ? Or: Cryptocurrencies legal qualification**
- **Art. 2 Federal Act on Currency and Payment Instruments**
 - **The following payment instruments are considered to be legal tender:**
 - **a. the coins issued by the Confederation;**
 - **b. The banknotes issued by the Swiss National Bank**
 - **c. Swiss franc sight deposits at the Swiss National Bank**
- **Other admitted payment means:**
 - **Scriptural money**
 - **E-money**
 - **Mean of payment only**

2.1 PROTECTION OF THE CREDITOR (3)

INTERIM CONCLUSION I

- **Bitcoins and ethereum are neither legal tenders nor other types of payment means under Federal Act on Currency and Payment Instruments regulation/usance**
- **Swiss Debt Collection and Bankruptcy Act does not apply.**
 - **Civil procedural code shall apply (execution)**
 - **A decision is needed (Art. 335 para. 1 CPC)**
 - **Enforceable (art. 336 CPC)**
 - **Execution request (art. 338 para. 1 CPC)**
 - **(except for directly enforceable decisions)**
 - **Before a tribunal (art. 338 et seq. CPC)**
 - **Claim for damages in case of inexecution (art. 345 CPC)**

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3. FINANCIAL MARKET REGULATION OVERVIEW

Financial market infrastructure

Bank

Securities dealer

Exchanges , market
places, trading
systems

Licenses for collective investment

Fund managers

Fund / regular asset
managers

Distribution/
product

AMLA

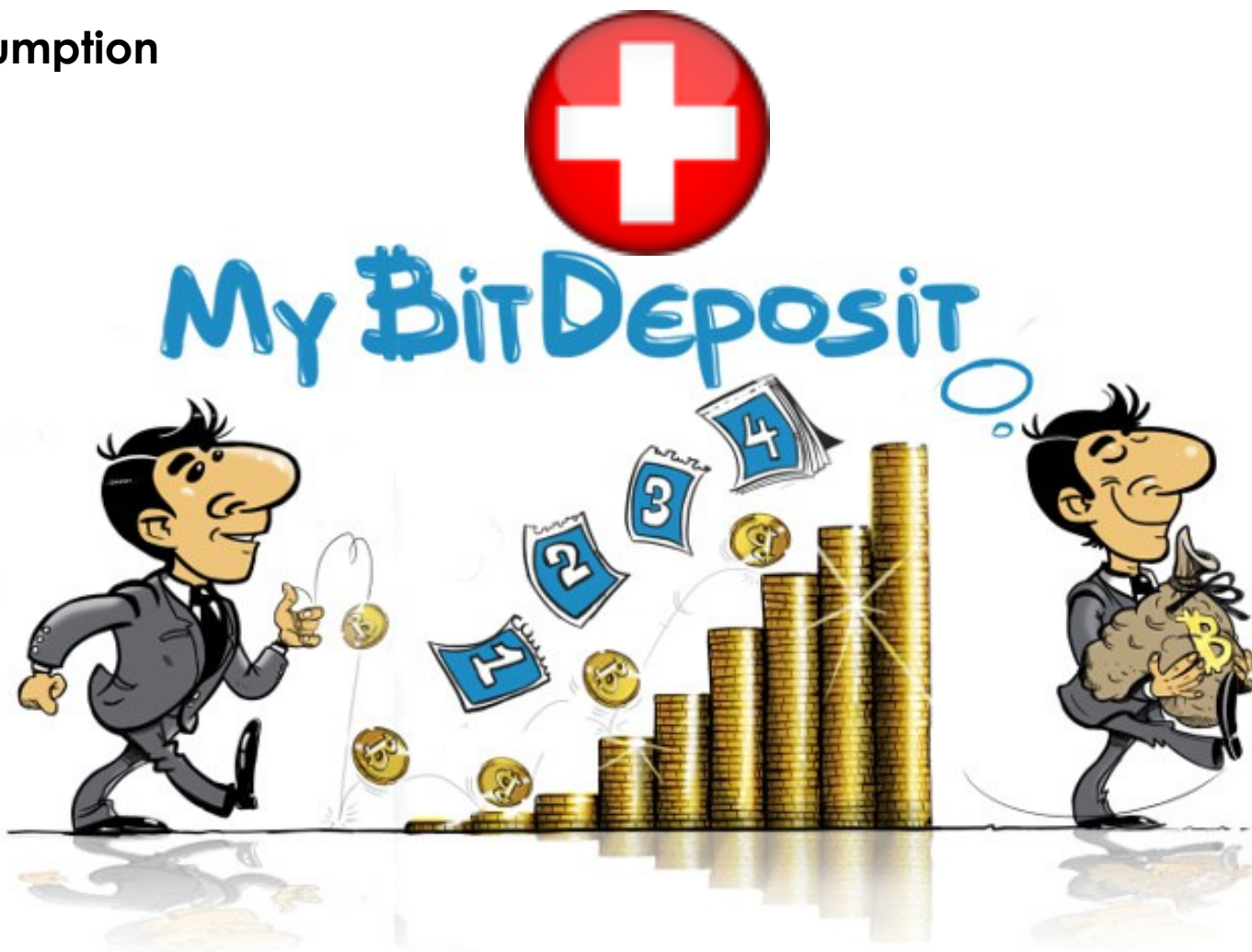
SRO

FINMA

Other laws/regulations
(consumer credit/data protection)

3.1 PROTECTION OF THE DEPOSITOR (1)

- Assumption



Source de l'image: <http://bitcoinprbuzz.com/>

3.1 PROTECTION OF THE DEPOSITOR (2)

- Assumption



BANKRUPTCY

3.2 CRYPTOCURRENCIES STORAGE/TRADING QUALIFICATION (1)

- Question: which kind of bankruptcy proceedings may be opened?
 - Which rights for the « depositors »?
- Subsequent question: cryptocurrencies storage/trading qualification
- Art. 2 let. a Swiss Ordinance on banks and saving banks:
 - Considered as banks are companies mainly active in the financial sector and that, in particular:
 - a. accept deposits from the public or which publicly recommend themselves for such; (...)
 - **20 deposits (or advertising) + « deposits » + from the public = bank**
- Art. 4 para. 1 Swiss Ordinance on banks and saving banks:
 - The following shall be deemed to be active in the financial sector:
 - a. institutions rendering financial services or those that broker these and especially those that operate the deposits and credit business, securities trading and the investment business on their own behalf or for third parties; or
 - b. institutions that own qualifying equity interests in companies mainly active in the financial sector (holding companies).

3.2 CRYPTOCURRENCIES STORAGE/TRADING QUALIFICATION (2)

- Art. 5 para. 1 Swiss Ordinance on banks and saving banks:
 - Deposits from the public shall be considered to be liabilities owed to clients, with the exception of the ones stated in (2) and (3).
 - **Presumption**
- Art. 5 para. 1 Swiss Ordinance on banks and saving banks:
 - The following are not considered to be deposits:
 - a. funds that constitute a **consideration from a contract for the transfer of ownership or for the rendering of a service** or which are transferred as a security; (...) and
 - e. **cash which is added in small amounts** to a means of payment or payment system and which only serves to settle future deliveries of goods or services and for which **no interest** is paid; **CHF 3'000.-** max. (Circ.-FINMA 2008/3 Cm 18bis)
 - c. credit balances on client accounts of securities dealers, precious metal traders, asset managers or any similar companies which solely serve the purpose of the settlement of client transactions, provided **no interest** is paid on them;
 - **i.e. execution accounts**

3.2 CRYPTOCURRENCIES STORAGE/TRADING QUALIFICATION (3)

- **Art. 10 Swiss Act on Stock Exchanges and Securities Dealers**
 - **Whosoever intends to carry out the activities of a securities dealer shall be subject to authorization by FINMA.**

- **Art. 2 let. b Swiss Act on Financial Market Infrastructures**
 - **Securities: standardised certificated and uncertificated securities, derivatives and intermediated securities, which are suitable for mass trading.**
 - *Valeurs mobilières*: les papiers-valeurs, les droits-valeurs, les dérivés et les titres intermédiés standardisés susceptibles d'être diffusés en grand nombre sur le marché.

3.2 CRYPTOCURRENCIES STORAGE/TRADING QUALIFICATION (4)

INTERIM CONCLUSION II

- **Bitcoins and ethereum as « payment means » (only) shall not qualify as deposits and are therefore not subject to banking regulation**
- **Bitcoins and ethereum exchange activities « trait pour trait/zug um zug » shall not qualify as deposit and are therefore not subject to banking regulation**
- **Bitcoins storage/trading activities are likely to be governed by banking regulation if an account in legal tender is opened (deposit)**
 - **Esisuisse!**
- **Bitcoins and ethereum shall not qualify as securities and trading of such is therefore not governed by the SESTA and the Financial Market infrastructure Act.**

3.3 CRYPTOCURRENCIES AND BANKRUPTCY (1)

- **Art. 242 Swiss Debt Collection and Bankruptcy Act**
 - Assets (« objets ») which do not belong to the bankrupt entity may be claimed back by the owner (claim of ownership, art. 242 para. 1 Swiss Debt Collection and Bankruptcy Act), and
- **Art. 37d Swiss Act on banks and saving banks**
 - Deposit items as defined in Article 16 shall be segregated in accordance with the provisions of Articles 17 and 18 of the Federal Intermediated Securities Act (FISA) dated 3 October 2008¹³⁹. In case of a shortfall, Article 19 FISA (of 3 October 2008) shall apply.
 - « Deposited items »: tangible assets and securities belonging to the depositor; 2. tangible assets, securities and claims which the bank safekeeps on behalf of the depositor; (...)
 - **Choses mobilières vs valeurs mobilières**
- **Tangible assets**
 - Factually and legally controllable / suitable to be possessed and owned
 - Physical form and identifiability
 - Electricity (Art. 713 Swiss Civil Code)
- **Question: may cryptocurrencies qualify as tangible assets and as such be claimed back/segregated?**

3.3 CRYPTOCURRENCIES AND BANKRUPTCY (2)

INTERIM CONCLUSION III

- **Factually and legally controllable / suitable to be possessed and owned**
 - ✓ **Bitcoins/ethereum wallet can be stored/processed/accessed on a tangible carrier medium**
 - ✓ **For any transaction, a private key is needed**
- **Physical form and identifiability**
 - ✓ **Bitcoins/ethereum wallet must be stored on a physical carrier medium (USB-stick, laptop, IT-server)**
 - ✓ **Every single bitcoin/ethereum wallet has its own signature and every transaction is identifiable in the blockchain**
- **Digital data like bitcoins and ethereum are tangible assets**
 - ✓ **From a legal point of view, they can be claimed back in bankruptcy proceedings**
 - ✓ **From a legal point of view, they can be segregated**
 - ✗ **Technical requirements may make the claim for ownership/the segregation impossible**
 - ✗ **Private key...**
- **Contra: Rapport du CF sur les monnaies virtuelles du 25 juin 2014, p. 13**

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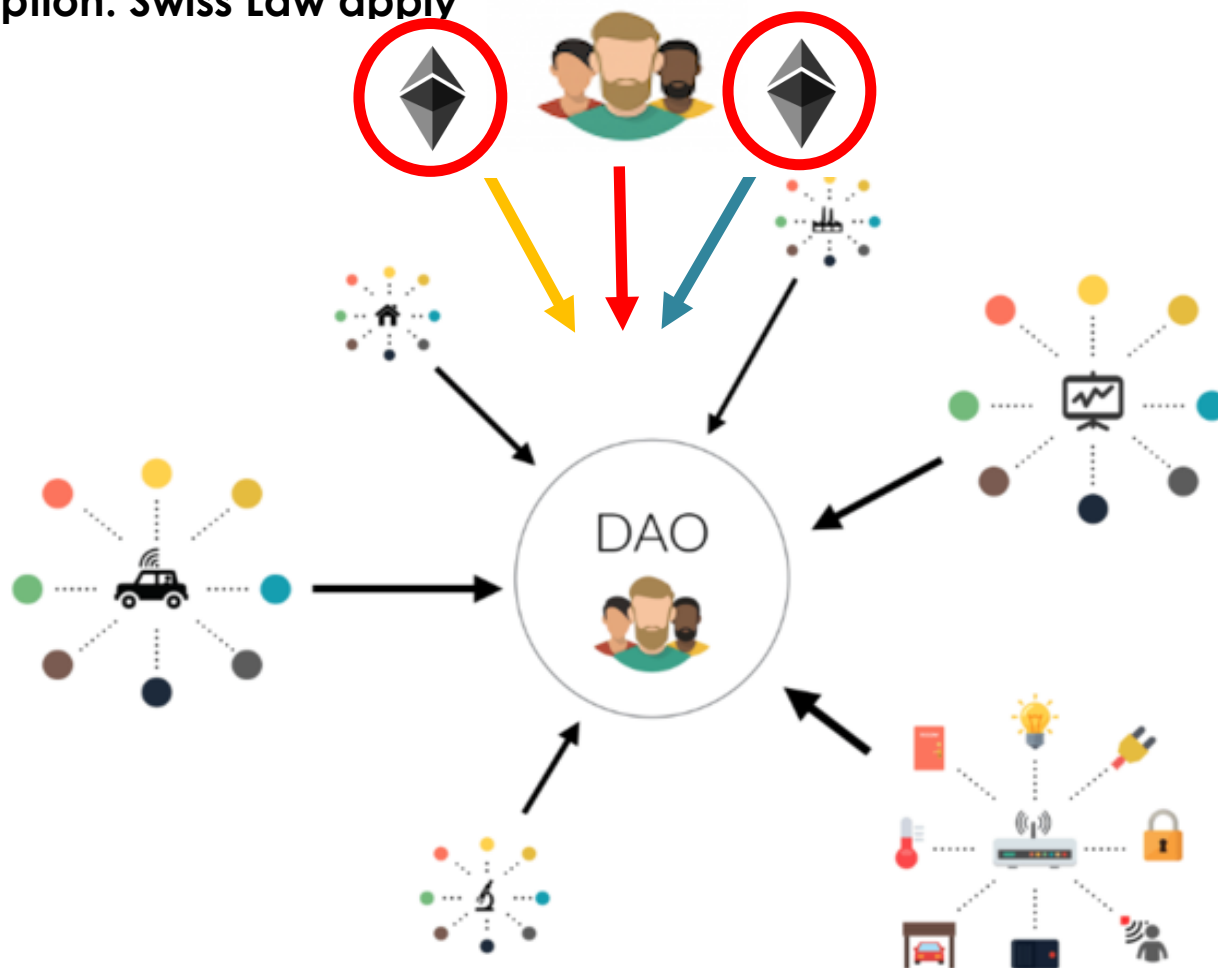
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4.1 DAO LEGAL QUALIFICATION ATTEMPT (1)

- DAO: « A Venture Fund With Plenty of Virtual Capital, but No Capitalist » (Nathaniel Popper, 21 may 2016, NYTIMES, <http://www.nytimes.com/2016/05/22/business/dealbook/crypto-ether-bitcoin-currency.html? r=0>), as of 30.06.2016, 15:53
- « A Decentralized autonomous organizations (“DAO”) is a new type of organization, best comparable to a digital company, but without an attached legal entity. Made from irrefutable computer code, it is operated entirely by its community, which backs its future growth by purchasing DAO tokens using ETH, the fuel of the Ethereum network. » <https://slock.it/dao.html> as of 01.10.2016, 14:43
- DAO in a nutshell
 - Investor invests ethereum in the DAO
 - Investor get token («voting and ownership rights»)
 - Investor can propose investments and vote on proposed investments
 - Funds retrieval for minority token holders (sub-DAO creation)
 - DAO.LINK Sàrl (service company entering into agreement with contractors)

4.1 DAO LEGAL QUALIFICATION ATTEMPT (2)

- Assumption: Swiss Law apply



- Question: is The DAO likely to be subject to the Swiss Act on Collective Investment Schemes?

Source de l'image, modifiée par l'auteur: <http://themerle.com/bitcoin-continues-to-dominate-the-dao-token-trading-markets/>

4.1 DAO LEGAL QUALIFICATION ATTEMPT (2)

- **Art. 7 Swiss Act on Collective Investment Schemes**
 - Collective investment schemes are assets raised from investors for the purpose of collective investment, and which are managed for the account of such investors.
- **Art. 5 Ordinance on Collective Investment Scheme**
 - Irrespective of legal status, collective investment schemes are assets provided by at least two mutually independent investors for the purpose of collective investment and which are managed externally.
- **Collective Investment Scheme in a nutshell:**
 - At least 2 investors
 - Investors bring assets
 - Assets are bought and managed independantly
 - All investors' assets are pooled
 - Assets are invested (Kapitalanlage/placement) and managed on behalf of the investors
 - « *Fremdverwaltung* » / club of investors

4.1 DAO LEGAL QUALIFICATION ATTEMPT (4)

- **Art. 13 para. 2 Swiss Act on Collective Investment Scheme**
 - **Must be authorized: a. fund management companies; b. SICAVs; c. limited partnerships for collective investment; d. SICAFs; e. custodian banks of Swiss collective investment schemes; f. asset managers of collective investment schemes; g. distributors; h. representatives of foreign collective investment schemes.**

- **Art. 15 para. 1 Swiss Act on Collective Investment Scheme**
 - **The following documents are required for obtaining the approval of FINMA: a. for investment fund, the collective investment contract (Art. 25); b. for SICAVs, the articles of association and investment regulations; c. for limited partnerships for collective investment, the company agreement; d. SICAFs, the articles of association and investment regulations; e. the relevant documents of foreign collective investment schemes which are distributed to non-qualified investors.**

4.1 DAO LEGAL QUALIFICATION ATTEMPT (3)

- Application to the DAO:
 - ✓ **Collective**
 - Investment?
 - Ethereum...
 - External management ? Investment Decision?
 - Club of investors of more than 20 people
 - **Equality of treatment of the investors**

Interim conclusion IV

???

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5. CONCLUSION

- Too much uncertainties
- Hudge challenge (thousands of investors, m/bilions at stake)
- Need for a protection of persons investing in the DAOs
 - e.g. how old are they?
 - are they sophisticated investors? qual. investors?
 - effective information/accuracy of information/truth re: investments
- Need for anti-laundering regulation in the DAOs (not only at exit)
 - Profit from ETH invested in contracts whose object may be illegal
- Blockchain technology brokes down the frontaries
 - Governing law?
- FINMA loves FinTech!
 - « La FINMA est prête pour les Fintech » (Rupert Schaefer)
 - Changement technologique et innovation dans l'industrie financière (Mark Branson)
 - Swiss Federal Council is supposed to issue a draft bill very soon

MERCI DE VOTRE ATTENTION !

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