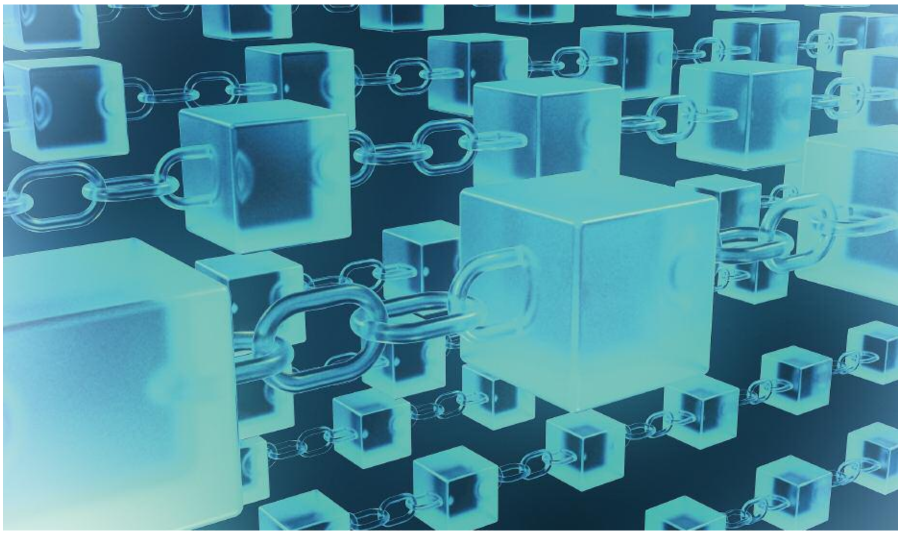
Framework conditions for DLT/blockchain technology to be improved in Switzerland

Dr. Lukas Bopp Prof. Dr. Daniel Staehelin of Kellerhals Carrard, Switzerland

Distributed Ledger Technology (DLT) and Blockchain Technology are among the most promising developments in digitisation today.

Switzerland is therefore one of the first countries in Europe to plan to adapt its legislation to developments in the technology of distributed electronic registers. The aim of the new legislation is to create the legal basis for Switzerland to further develop its position as a leading, innovative and sustainable location for block chain/distributed ledger technology (DLT) companies. The legislation project was launched in December 2018 with a report on the legal framework for block chain and DLT in the financial sector. On November 27, 2019 the Swiss Federal Council just published the project on the adaption of the federal law to developments in the distributed ledger technology.



Legal certainty sought

The proposal is aimed at increasing legal certainty, removing barriers for applications based on distributed ledger technology and reducing the risk of abuse. The proposed new federal legislation, which is designed as a blanket framework, suggests specific amendments to nine federal acts, covering both civil law, financial market law and insolvency law. The Parliament will probably examine the proposal for the first time in early 2020.

In practice, crypto-based assets - which include crypto-based means of payment (or payment tokens) on the one hand, and DLT value rights on the other, are often not held in custody by the beneficial owner, but by a third party (e.g. a so-called wallet-provider as depositary). If such a wallet-provider goes bankrupt, the question arises whether the crypto-based assets he holds in his custody fall into the bankruptcy estate or whether they can be segregated and transferred to the beneficial owners (instead of the general bankruptcy creditors).

Segregation of crypto-based assets

The provisions of the proposed new insolvency law will regulate which prerequisites must be fulfilled so that a crypto-based asset can be sufficiently strongly attributed to a certain person in order to be segregated in a bankruptcy. In accordance with the criterion of exclusive power of disposition in the case of physical property, the concrete form of the right of access to a crypto-based asset will be the decisive elements to decide on segregation: if the access key is known exclusively to the customer, only the customer may dispose of it and initiate a transaction on the block chain, not the wallet-provider. Thus, in such a case, there is no external custody and the corresponding assets are accordingly not included in the bankrupt's estate. The same applies according to the proposed regulation if more than one key is required to dispose of the asset and if the bankrupt's estate does not have sufficient keys to dispose of the crypto-based asset without the participation of other authorised persons. Only if the customer has no access of his own and only the bankrupt has simultaneously all the keys to access the asset directly, does the value fall into the bankrupt's estate.

Access to data guaranteed

In addition to the introduction of a statutory right of segregation for crypto-based assets, a right to access data held in the custody of a bankruptcy estate is foreseen in the new legislation. The current bankruptcy law provides for segregation only for physical property, but not for data, although these may still have a much higher value for the beneficiaries than physical property. In the event of the bankruptcy of a cloud provider, for example, there is considerable legal uncertainty as to whether and how authorised parties can access data stored with the provider (e.g. a customer file, an accounting department or even just photos) in the event of bankruptcy. The new regime creates a legal basis to provide access to such data in the event of bankruptcy.

The planned measures will strengthen the reliability of services in the DLT sector and generally in connection with Internet services. This increases confidence and strengthens the acceptance and dissemination of new technologies.