Legal aspects of the tokenization of securities – The Swiss and UK approaches

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Contrary to what is often suggested, the tokenization of securities cannot be reduced to a technological process that can be deployed seamlessly across jurisdictions. Rather, associating a security with a digital token recorded on a distributed ledger – such as a Blockchain – is as much a legal process as it is a technological one, and therefore depends on the specific legal framework of each jurisdiction. However, despite national specificities in the tokenization framework, the use of standardized smart contracts to generate digital tokens addresses the financial industry's practical need for efficiency and cost management. Whether the industry ultimately gravitates toward proprietary commercial solutions or open-source, community-driven ones for this purpose will be a matter of major strategic importance for the future development of international market infrastructures.

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I. Introduction

The tokenization of financial instruments – and more specifically of securities – is a particularly current topic. The process is – rightly – considered central to the global efforts to digitize capital markets.

However, despite the large number of initiatives undertaken on this subject in many jurisdictions, as well as international efforts to promote this practice, surprisingly little analysis has been devoted to the – nonetheless central – legal process by which securities can be handled in the form of digital tokens.[1] Often, the tokenization process is seen as self-evident, or as a technological rather than a legal process. Attention is then focused on the ledgers on which the digital tokens are recorded, or on the computer code – the "smart contracts" – through which the digital tokens are created. However, little attention is paid to the legal process by which the security is embedded in, or associated with, the token. Yet this process is essential. Tokenizing a security implies ensuring that the rights attached to it follow the digital token to which it is linked, and conversely, that the digital token cannot be transferred without the associated security being transferred as well.

As this article demonstrates, this process cannot be reduced to a technological one. On the contrary, it is a legal process which is, consequently, necessarily tied to a specific legal system.

The first part of this article outlines the key elements relevant to the legal treatment of the tokenization process, namely the concepts of securities, eligible ledgers, digital tokens, and the association between securities and tokens. The second part examines how the tokenization process is regulated under Swiss law, and the third under English law. The article concludes with a discussion of the practical implications

1 Recent examples of efforts toward such analysis include the so-called "Guardian Project", a collaborative initiative between policymakers and financial institutions under the leadership of the Monetary Authority of Singapore. The project aims to enhance the liquidity and efficiency of financial markets through asset tokenization. See for example: Guardian Fixed Income Industry Group, Fixed Income Framework, (quoted "Guardian Fixed Income Framework"), November 2024, Section 7, Principle 7, available at: <*https://rb.gy/5xudpf*> (discusses design principles for tokenized securities, including the need to address the legal process for the creation, transfer, and encumbrance of tokenized securities, as well as the manner in which legal title to such instruments can be established).

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