

El Salvador's announcement: a Swiss legal perspective

The Asamblea Legislativa de El Salvador announced on Wednesday (8th of June 2021) the adoption of a bill that introduces bitcoin as legal tender.^[1] From a legal perspective, this announcement is likely to have worldwide repercussions.

Bitcoin's status under Swiss law

Bitcoin is considered a pure payment token under Swiss law, which - as opposed to CHF - is not legal tender (cf. art. 84 SCO, FINMA ICO Guidelines). It is usually viewed as a debt in kind, where the creditor owes the amount of bitcoins due independently of their value. Recognition of bitcoin as foreign currency under art. 147 PILA *cum* art. 84 II SCO - like the USD - requires at least one foreign country to accept it as legal tender.

What does El Salvador's bill change?

The bill will create some legal uncertainty as the payment in bitcoin might then be considered, depending on the situation or opinions, a debt in kind or a debt in a foreign currency.

The difference between both qualifications is drastic. A debt obligation expressed in a foreign currency can, for instance, be paid alternatively in CHF at the value on the debt maturity date (art. 84 II SCO),^[2] and can even be subject to moratory interest (art. 104 SCO). Further, the inherent value of the fiat payment due can be considered stable.

A clarification ironically blurring the status of bitcoin

The introduction of bitcoin as legal tender would ironically blur its current legal status and result in complicated case-by-case assessments with unforeseen consequences.

If this adoption leads to a wider recognition of bitcoin as legal tender internationally, it could have the status of multiple jurisdictions' foreign currencies at the same time (e.g., currency of El Salvador, Panama, etc.). Further, bitcoin instantly becomes a foreign currency in every country recognizing El Salvador's sovereignty. Concretely, the sale in Switzerland of a car where the price is labelled in bitcoin could be interpreted as a debt considered in a foreign currency (e.g., El Salvador's currency).

Another view would be to consider bitcoin as legal tender only when it can be expressly interpreted as such (art. 18 SCO) or when there is a link to El Salvador, e.g., as the place of execution (art. 74 SCO). The latter solution would make bitcoin an exception among legal tenders as, for instance, nobody instinctively questions the status of legal tender of EUR in a contract between UK and CH.

As a result, the contemplated bill creates a historical use case from a monetary and legal perspective affecting indirectly every country in the world. The use of bitcoin as legal tender is likely to pose important problems in terms of unit of account and technologic neutrality. In our view, the SNB should issue a statement clarifying the current status of bitcoin in Switzerland.

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[1] Official release <https://twitter.com/asambleasv/status/1402508029564760064?s=24> ; <https://www.asamblea.gob.sv/decretos/ultimos> ; English translation https://cryptonews.com/news/el-salvador-passes-the-bitcoin-law-10617.htm?fbclid=IwAR1uEDzmb9E6Js_C4be92UxhvDKFqT93kYiK8v6kPdYKtmBXGhcBqVvYBUc

[2] Note, the doctrine concurs to say that this possibility is available only when the place of payment is in Switzerland.