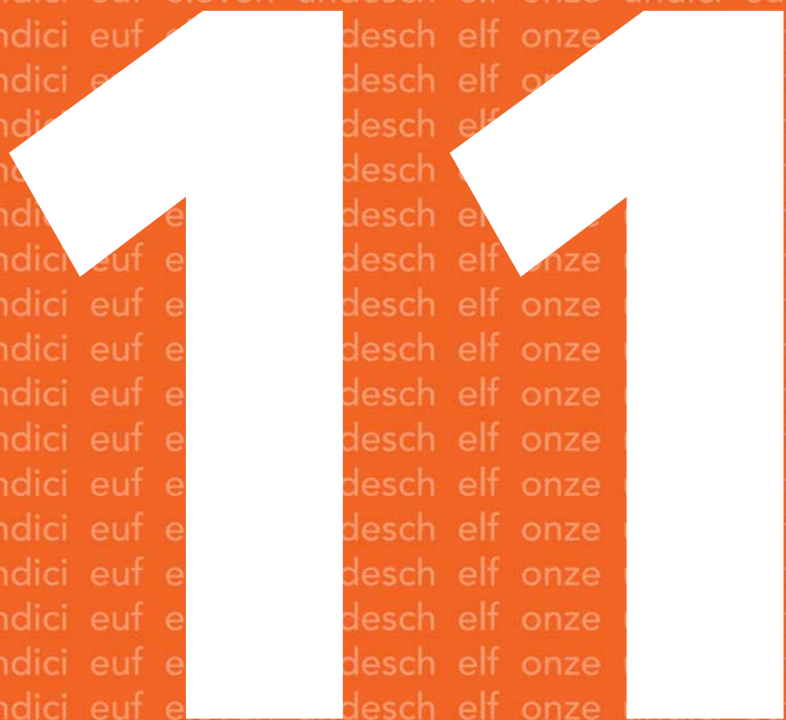


Startup GUIDE 2019/20

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Dear Reader

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- investors and industrial companies
- students
- politicians and civil servants and
- the general public

a quicker introduction and better understanding of the Innovation Ecosystem in Switzerland.

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I wish you an encouraging reading, hope to meet you soon

Jean-Pierre Vuilleumier
Editor



JEAN-PIERRE VUILLEUMIER
Managing Director Startup INVEST

WalderWyss

Token Shares – Current Rules and Outlook

In a digital environment there is a considerable need to have digital shares as well. Does this mean that you can tokenise the shares of your start-up? Will this idea take your company to new (marketing) heights, or will it leave you staring into a legal abyss from the very outset?

Token shares can be regarded as uncertificated securities. The shares must be tied to the tokens in such a way that the shareholder status is linked exclusively to the corresponding token. However, token shares are only feasible if they can be transferred in accordance with the procedural rules.

The current law provides that uncertificated securities must be transferred by assignment, thus requiring a written document (book entry securities are excluded from this requirement, but are not a practical solution in the blockchain context). The written form requires a wet ink handwritten signature or a qualified electronic signature with a qualified time stamp. Neither of these (quasi-) written forms seem especially compatible with the blockchain world and token shares.

Some legal experts would like to overcome this transfer hurdle by a transfer agreement. The transfer agreement is an exception to the requirement of writing for assignments and requires all the parties to be included in the transaction. In addition to the seller of the shares and the purchaser of the shares, the company would also have to be included as the debtor in respect of the pecuniary rights and to company membership vis-à-vis its shareholders. However, it is open to question whether, on the one hand, this transfer agreement procedure can be applied analogously to the transfer of uncertificated securities and on the other, how companies can consent to such agreements. Simply making the blockchain system available, in our opinion, can hardly be regarded as implied consent to all future transfers. It seems impractical, though, to give specific consent to each individual transaction. The controversial question remains of whether blanket consent in advance (for example in the white paper) will satisfy the legal requirements. In a ruling rendered in 2011, the Zurich Cantonal Supreme Court answered a related question in the negative, which means it is more than questionable whether anything can be gained from the construct of the transfer of receivables. Serious start-ups will hardly want to rely on this uncertain basis under the current law.

The preliminary draft of a future securities law (as part of the adaptation of federal law to developments in distributed ledger technology) wants to make the blockchain transfer of token shares possible in principle, and sets out the requirements by which token shares can have the character of securities. The preliminary draft anticipates that token shares can be transferred on the blockchain. In order to remove any doubt about this pure digital transfer, the current wording should be changed in course of the legislative process by explicitly stating the exclusion of the written form for such share transfers.

From a technical point of view, shares can easily be transferred in a fully digital procedure on the blockchain. In Swiss securities law however, the crypto-world collides with its analogue predecessor, which demands written documents. According to the prevailing opinion, a share cannot be validly transferred on the blockchain under the current law. So start-ups should wait a little longer before using token shares; the legislative wheels are already slowly starting to turn and securities law is set to move into the digital era in the near future.

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