



---

# Webinar Series Blockchain

«Initial Coin Offering (ICO): New Financing Reform  
– Opportunities and Pitfalls»

Dr. Martin Hess, Partner  
My Chau Bachelard, Associate

---

---

# Comparison – Procedure

## ICO / TGE

1. Product/business idea, elaboration of the idea in the white paper
2. Pre-funding by FFFs / business angels within a limited circle, formation of company
3. ICO: Money versus token, based on the white paper
4. Project development / realization, failure possible
5. Token trading (secondary market, crypto-exchanges)

## Traditional Financing

1. Product/business idea
2. Early stage – from the idea to the know-how / patent / prototype, etc.
3. Company formation, financing by the founder and business angels
4. Financing by external parties (VC), usually several rounds, documentation (!)
5. Going public by means of a prospectus

---

# Comparison – Characteristics

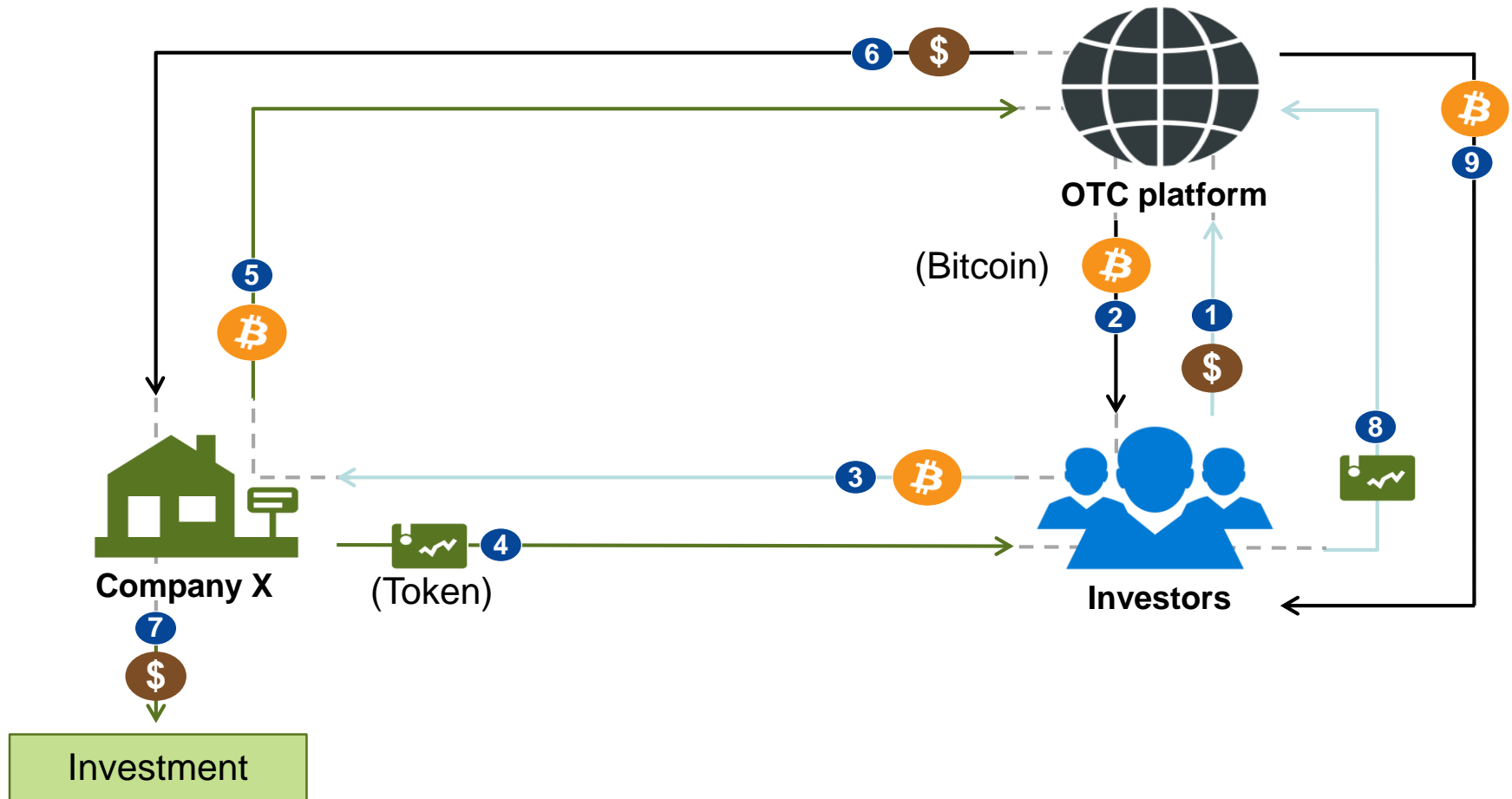
## ICO / TGE

- No legally-defined requirements for the white paper
- No multiple financing rounds
- Inexpensive listing on cryptocurrency exchanges
- Hardly any involvement of banks/advisers
- As a rule, no participation of the token holders

## Traditional Financing

- Complex, expensive documentation of all steps
- Financing rounds
- Prospectus for the IPO
- Involvement of advisers / banks
- Participation of the investors who become co-partners or members of executive bodies

# How are ICOs structured?



© ZKB Andreas Neumann

# Structuring of the Tokens

In accordance with the FINMA Guidelines for ICOs (16 February 2018)

Payment Tokens	Utility Tokens	Asset Tokens
Bitcoin, Ether	User Subscription	Equity/Debt Coins
<ul style="list-style-type: none"> <li>• Not securities</li> <li>• Not banking activity</li> <li>• <b>Means of payment</b> under the Anti-Money Laundering Act (AMLA)</li> </ul>	<ul style="list-style-type: none"> <li>• Not securities (unless investment function)</li> <li>• Not banking activity</li> <li>• Not means of payment, provided that:               <ul style="list-style-type: none"> <li>• Payment function is only accessory, and</li> <li>• Blockchain is not utilized for financial sector purposes</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Securities (prospectus requirement)</b></li> <li>• Not banking activity</li> <li>• Not means of payment</li> </ul>
→ Full AML / KYC, now also <b>affiliation with a self-regulatory organization (SRO)</b>	→ Not subject to the AMLA	→ Not subject to the AMLA

→ FINMA **does not prohibit ICOs**, but lays down requirements

- Legal advice is imperative
- Duration is longer than assumed – as a rule, 3 months' preparation

---

# Category of Payment Tokens

## «Means of payment» function if the token:

- Can be used to purchase goods or services; and
- Serves to transfer money and value on the blockchain.

Examples: virtual currency such as BTC and ETH

# Classification under Swiss law

The categorisation of payment token leads to the application of the AMLA-rules.

There are two ways of compliance:

<b>Intake of funds by the issuer himself</b>	<b>Intake of funds by a financial intermediary that is subject to the AMLA in Switzerland</b>
SRO affiliation or directly subordinated financial intermediary	Neither SRO affiliation nor directly sub-ordinated financial intermediary necessary
Due diligence obligations: <ul style="list-style-type: none"><li>• full KYC</li><li>• establishing identity of the beneficial owner (BO)</li><li>• organisational measures</li><li>• record retention and documentation obligation</li><li>• etc.</li></ul>	Due diligence obligations: <ul style="list-style-type: none"><li>• full KYC</li><li>• establishing identity of the BO</li><li>• organisational measures</li><li>• record retention and documentation obligation</li><li>• etc.</li></ul>
→ subject to AMLA	→ subject to the AMLA

---

# Category of Utility Tokens

## **The token confers:**

- The right to use
- The right to access
- The right of participation in

... a platform based on the blockchain and its functionalities / applications (decentralised application)



---

# Classification under Swiss law

## **Not securities if:**

- Sole purpose is to confer a right to access/use/participate in a blockchain platform or DApp
- It can be used in this way at the point of issue (token has **no** investment function)
  - no prospectus requirement

## **Not subject to the AMLA if:**

- Main purpose is the use of a digital service outside of the financial sector, and
- Payment function is only an accessory/subordinate service

---

# Accessory Service

## Requirements

- The accessory service is integrated into the contractual relationship (unrelated to the financial sector)
- The contracting party who provides the primary service also provides the accessory service
- The accessory service is of subordinate importance to the primary service
- The provision of the main service is not necessarily possible without the token

*(on a cumulative basis)*

---

# Category of Asset Tokens

## **If the token confers the following rights:**

- Rights to participate in profit or revenues (e.g., digital participation certificate)
- Membership rights under company law, such as voting rights
- Derivative rights (e.g., forward: claim to delivery in the future of currencies, securities)

# Classification under Swiss law

= Securities under Art. 2(b) of the FMIA	≠ Securities under Art. 2(b) of the FMIA
Derivative or uncertificated security	Derivative or uncertificated security
<ul style="list-style-type: none"><li>• <b>Standardised</b> and</li><li>• Suitable for <b>mass trading</b> (more than 20 investors)</li></ul>	<ul style="list-style-type: none"><li>• <b>Limited or closed target audience</b> (FFFs or less than 20 investors)</li><li>• Cannot be traded or transferred</li></ul>
→ Prospectus requirement  → Obligation to obtain license as a dealer in derivatives if derivatives are self-created and publicly offered on the primary market for the own account or the account of a third party	→ No prospectus requirement  → No licensing obligation

---

# Hybrid Token

## **Utility Token / Payment Token**

→ Subject to the AMLA (unless the payment aspect is only accessory/subordinate)

## **Asset Token / Payment Token**

→ Subject to the AMLA (unless the payment aspect is only accessory/subordinate)

→ Prospectus requirement (unless token cannot be traded / transferred and is only offered to a limited target audience)

## **Utility Token / Asset Token**

→ Prospectus requirement (unless token cannot be traded / transferred and is only offered to a limited target audience)

# Classification Pre-Sale / Pre-Functional

Pre-Financing	Pre-Sale (Voucher Token)	Pre-Functional	ICO/TGE	Secondary Market
Sale of tokens that are not yet in existence	Sale of tokens that confer an entitlement to real tokens in connection with the ICO	Sale of tokens that are not yet able to function / be utilized	Sale of fully functioning tokens	Professional currency exchange (crypto vs. Fiat) or transfer of money (if the service provider manages the private key)
Uncertificated security (or possibly derivative?)	Derivative	Uncertificated security (or possibly derivative?)	Classification under FINMA Guidance for ICOs (cf. further above)	Payment token
Securities only if issued on standardised basis (to more than 20 investors) and suitable for mass trading. <b>Recommendation: preclude assignment/trading</b>				
→ Potentially subject to prospectus requirement → Potentially subject to licensing obligation as dealer in derivatives				
→ <b>Not subject to the AMLA</b> because no payment token exists yet at this stage		→ <b>Subject to the AMLA if payment token</b>		→ <b>Subject to the AMLA</b>

---

# Summary

The FINMA Guidance for ICOs provides greater clarity in terms of the categorization and classification of tokens

## **Nonetheless:**

- Tokens are not standard products – each ICO is a special case and requires a separate assessment
- Difficult to differentiate if a Utility Token with a payment element falls under the AMLA obligation
- Utility Token with investment function?
- Fuzzy regulation of the pre-sale and/or pre-functional stages
- Problem of the legal forms of transfer still unresolved

---

# Forms of Transfer under Current Law

**Claims:** Assignment (Art. 164 et seq. CO)

→ Digital written form possible (qualified electronic signature under Art. 14 para. 2bis CO)

**Objects:** transfer of possession (Art. 922 et seq. SCC)

→ Not possible in digital form

**Intermediated securities:** instruction and credit (Art. 24 FISA)



---

# Forms of Transfer under Current Law

## **Intermediated securities:** instruction and credit (Art. 24 FISA)

- Art. 973c CO: Purely internet-based issue of coins/tokens as uncertificated securities (uncertificated securities book)
- Art. 6 para. 2 FISA: The entry of uncertificated securities in the main register of a custodian creates **intermediated securities**
- Uncertificated securities book und main register will be kept by means of the distributed ledger
- **Instruction** of the seller as a basis for disposition (Arts. 15, 24 para. 1 FISA)
- No requirements as to form for the instruction, so digitally possible
- Consummation of the disposition by means of credit to the acquirer's securities account (Art. 24 para. 1 FISA), digital process

→ Problem: Federal Intermediated Securities Act only applies for custodians – is the distributed ledger a custodian?

---

# Forms of Transfer under Current Law

## Proposed Solutions

<ul style="list-style-type: none"><li>• transfer of agreement</li><li>• 3-party transaction</li><li>• implementation difficult in practice, in part not 100% supported from a legal perspective</li></ul>	<ul style="list-style-type: none"><li>• extensive interpretation contrary to the wording of securities law in order that a token is deemed to be a security</li></ul>	<ul style="list-style-type: none"><li>• legislation</li><li>• explicit classification of tokens as securities under the CO (see proposal for Art. 973d CO)</li></ul>
---	---	--

---

# Final Considerations

## Pro ICO


- Intake of funds with limited participation of the investors
- Intake of funds already without presentable product
- Inexpensive, hardly any involvement of banks, no complicated listing on exchanges
- Transaction chain that is unchangeable and can be verified at any time
- Tokenisation of the processes facilitates transactions, will become cost-efficient standard

## Contra ICO

- Failure of the project
- Intervention of the regulators
- No identification of the investors based on the technology
- Civil law uncertainty about what the token represents and the rights it confers
- Cybersecurity (hacker attacks, etc.)
- Increasing convergence with IPO
  - Regulation is making strides
  - Token audit will become standard
  - Clarification of open legal issues sought

**wenger & vieli**  
Attorneys at law

---



Wenger & Vieli Ltd.  
Dufourstrasse 56, P.O. Box, CH-8034 Zurich  
T +41 (0)58 958 58 58, [www.wengervieli.ch](http://www.wengervieli.ch)

---