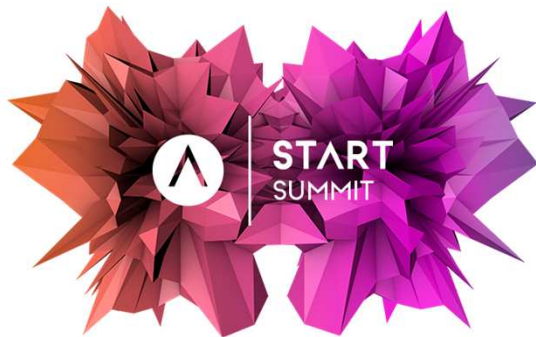




wenger & vieli  
Rechtsanwälte

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# FINANCING FOR STARTUPS IN TIMES OF ICOS AND BITCOINS – LEGAL AND TAX CONSIDERATIONS



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# Your hosts and workshop leaders



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# Agenda

- **Overview of Venture Market**
- **Recent Exits**
- **Transaction Structure**
- **Initial Coin Offering & Co.**
- **Legal Challenges**
- **FINMA Guidelines**
- **Contribution in Kind**
- **Conclusion**

# Overview of Venture Market

## Overview of Venture Markt

Recent Exits

Transaction Structure

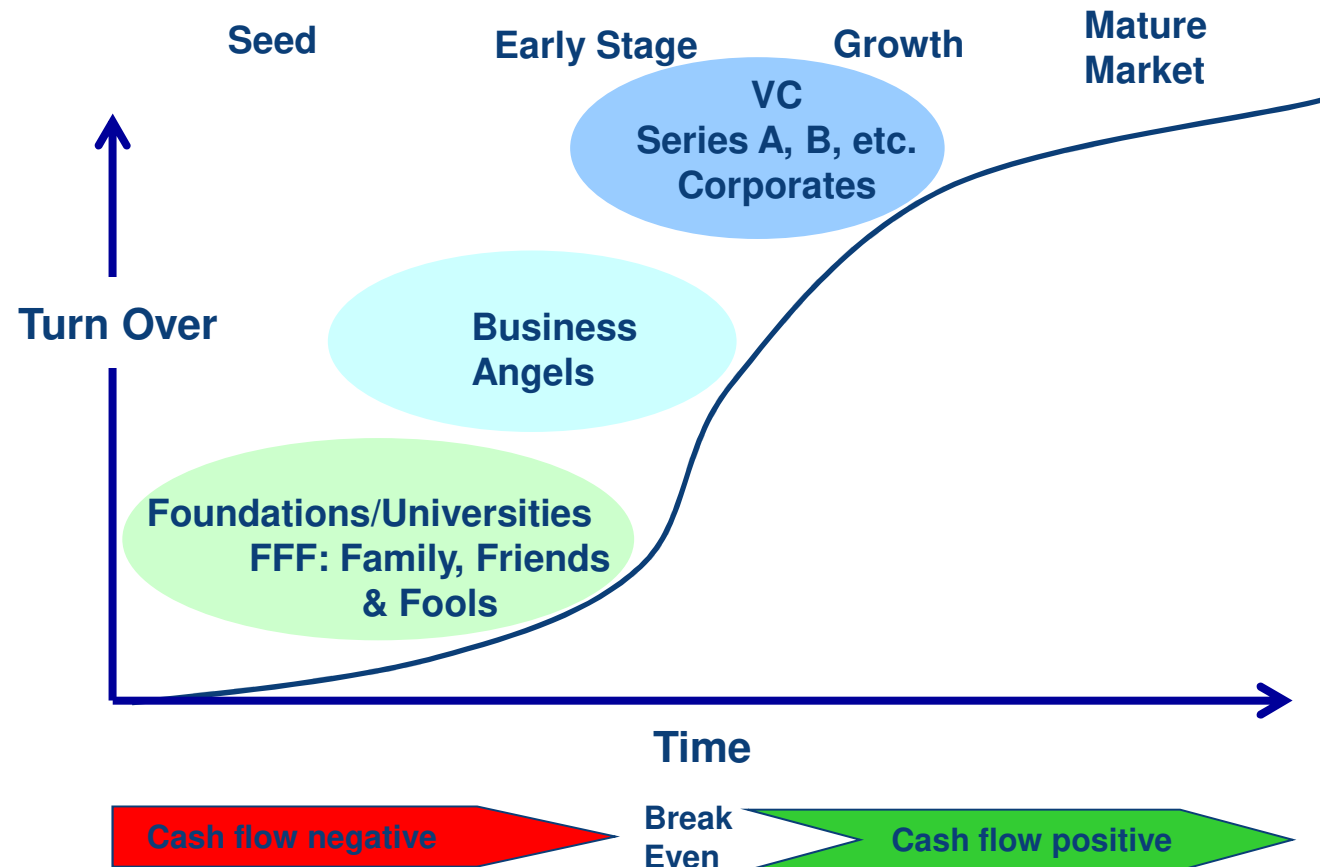
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# The Big (Financing) Picture

## Overview of Venture Markt

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Who finances ?

**7. Exit: IPO, Trade Sale, Secondary Sale, Buy Back**

**6. Financing Round N:** further outside Investors

**5. Financing Round 2:** further outside Investors

**4. Financing Round 1:** first bigger outside financing round

**3. Incorporation:** in cash and/or by contribution in kind

**2. „Seed“:** from an idea to know-how / IPR / Prototype etc.

**1. Business- / Product Idea**

**Venture  
Capitalists**

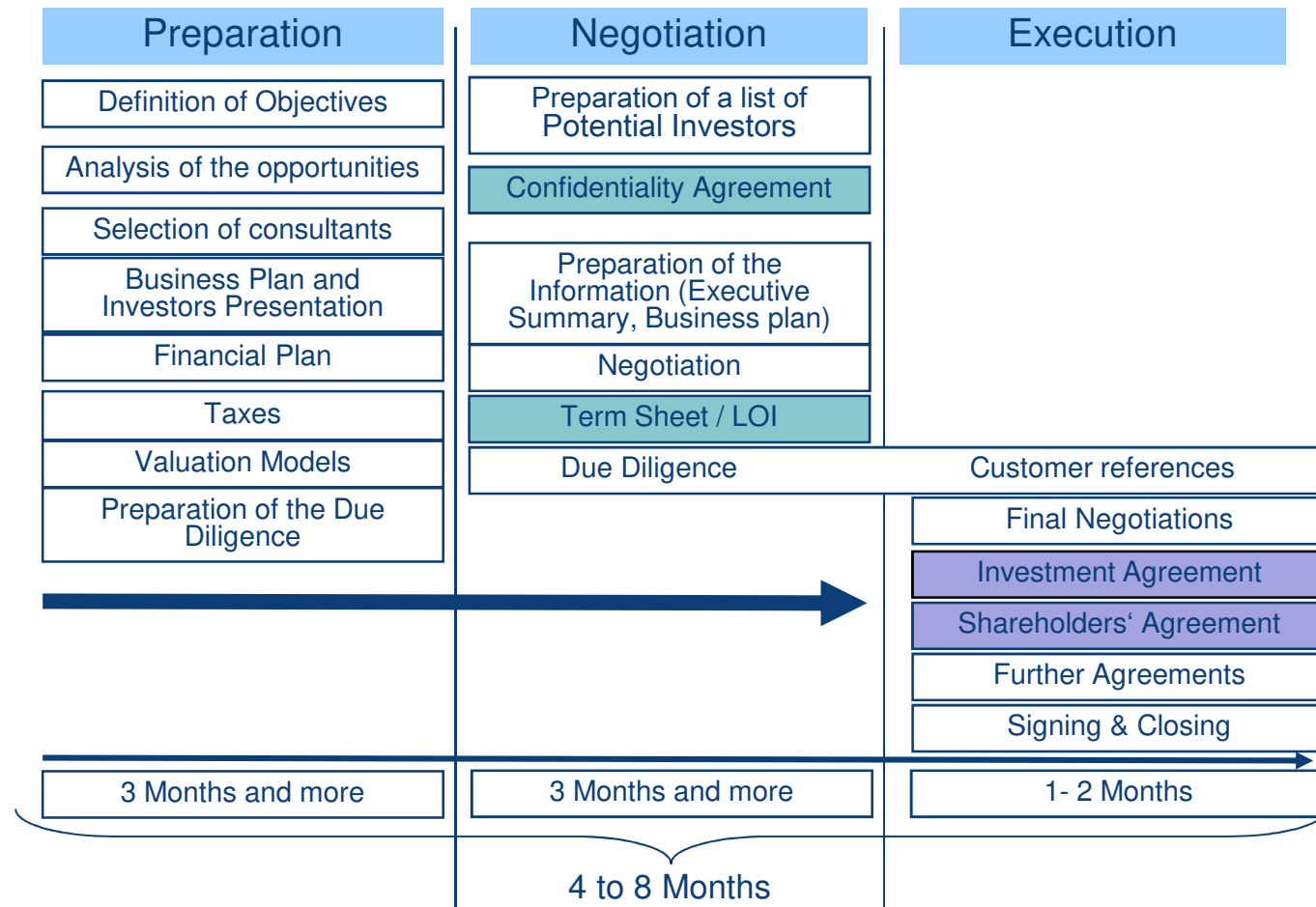
**Business  
Angels**

**FFF**

# The Big (Transaction) Picture

## Overview of Venture Markt

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# Recent Exits - Targets

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# Recent Exits – Buyers

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tamedia:





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# Recent Exits - IPOs

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# Transaction Structure (i) – Investment Phases of Private Equity and VC

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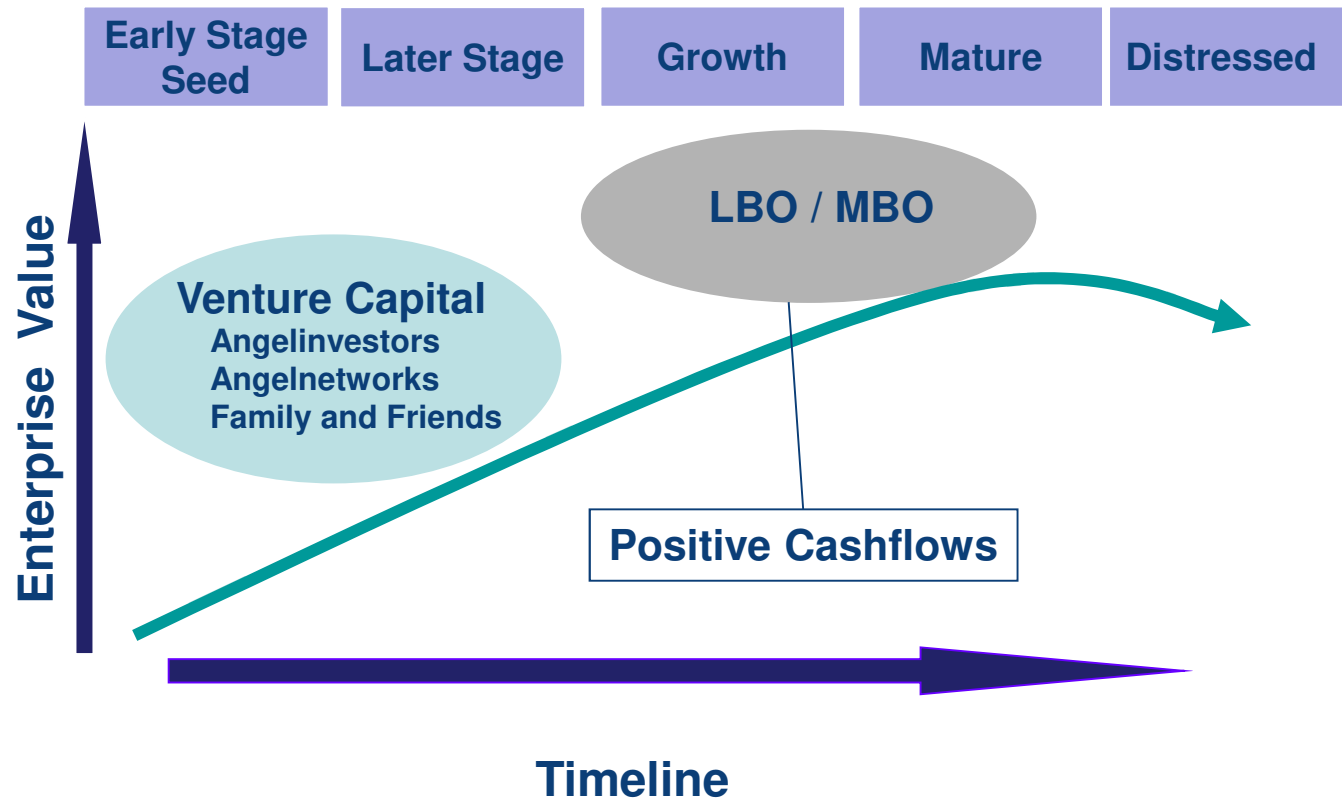
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# Transaction Structure (ii) – PE / VC Fund-Structure

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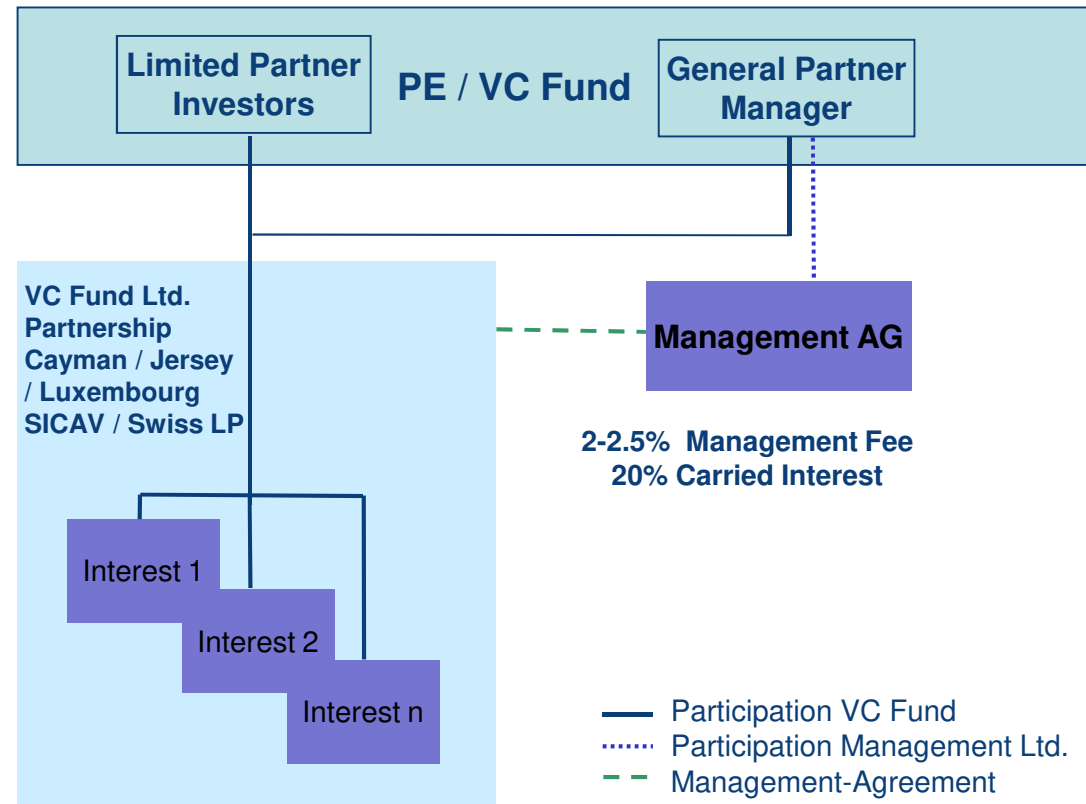
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Typically with a  
10 year term  
of the structure



# Transaction Structure (iii) – Venture Capital – Agreement Structure

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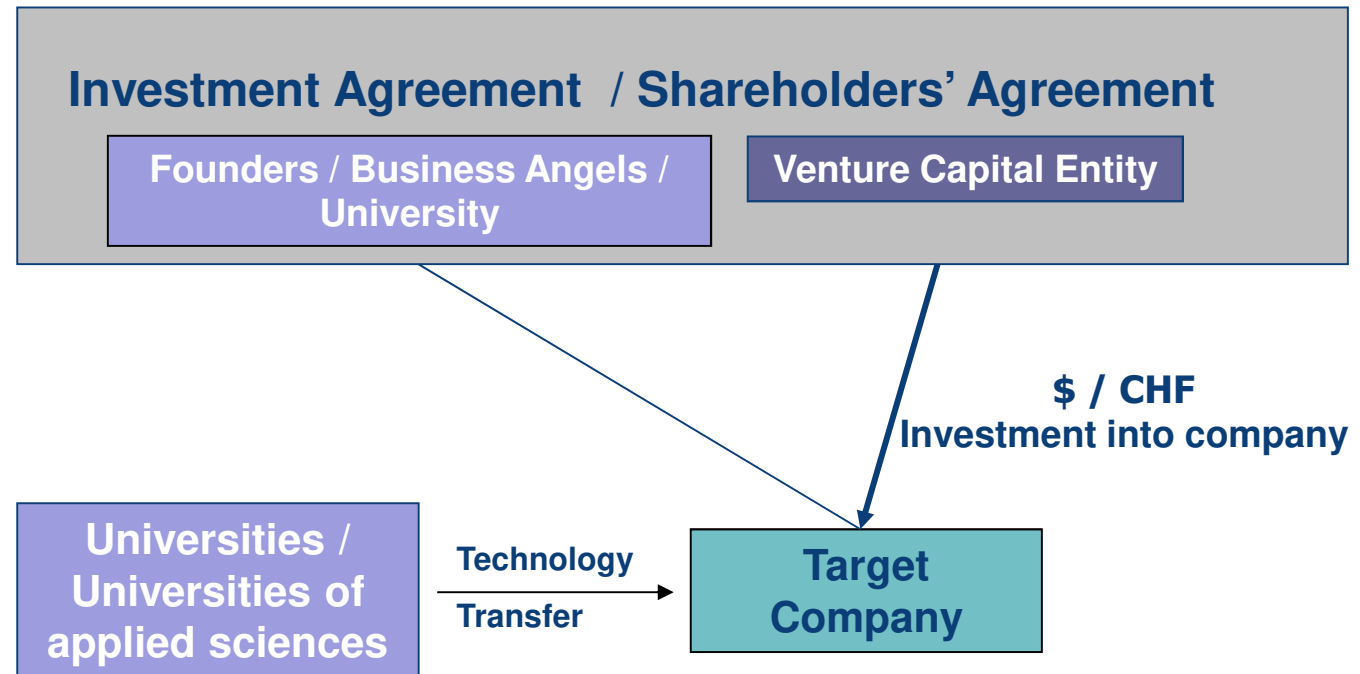
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# Initial Coin Offering (ICO) & Co. (i)

Purpose: *Financing* of projects or companies  
*Financing instrument*: issue of Tokens / Coins

- Token / Coin: digital data that contain a promise (IOU) and recorded on the *Blockchain / Distributed Ledger*
- Content of the promise is a *right* (utilisation, money, participation rights)
- Tokens have a price which is usually payed in virtual currencies
- Tokens are *tradable*

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# Initial Coin Offering (ICO) & Co. (ii)

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- Examples from Switzerland
  - Tezos (Product: Smart Contracts),  
USD 230'000'000
  - Bancor (Product: trade platform),  
USD 153'000'000

# ICO / TGE vs. traditional financing (Life cycles)

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ICO / TGE	Traditional financing
Product- / business idea, formulation in White Paper	Product- / business idea
Pre-Funding trough FFF / Business Angels (limited), company formation	Early phase from the idea to know-how / patent / prototype etc.
ICO: money against token, based on White Paper	Company formation, financing through founder and Business Angels
Project development and realization, failure possible	Financing through outside parties (VC), mostly various rounds, documentation!
Token trading (secondary market, Crypto-Exchanges)	IPO with a prospectus

# ICO / TGE vs. traditional financing

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## ICO / TGE

No legally defined content requirements of the White Paper

- No repeated financing rounds
- Cheap listing on crypto currency exchanges

Hardly any involvement of banks / consultants

Normally no participation of Token holders

## Traditional financing

Expensive documentation of all stages

- Financing rounds
- Prospectus for the IPO

Involvement of banks / consultants / auditors / etc.

Participation of the investors who become co-shareholders or members of corporate bodies



# The Big (Financing) Picture

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# Differences ICO vs. IPO (i)

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	IPO	ICO	Tendency
<b>Issuance of</b>	shares	Token / Coins	█
<b>Documentation</b>	Prospectus	White Paper	↑
<b>Duration</b>	6 – 12 months	3 – 6 months	↗
<b>Issuer</b>	AG	AG, GmbH, Foundation	█
<b>Grade of professionalization</b>	High	Low	↑
<b>Regulation</b>	High	Medium	↗

# Differences ICO vs. IPO (ii)

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	IPO	ICO	Tendency
<b>Parties / Advisors</b>	Stock Exchange, Banks, Lawyers, Auditors	«Banks», Lawyers	█
<b>Costs</b>	4 - 9%	CHF 0.25 – 0.5m	█
<b>Business Model</b>	Profitabel	Idea / Project	↑
<b>Rights</b>	Voting rights / Dividends	Depending on Token	↗

# Differences ICO vs. IPO (iii)

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	<b>IPO</b>	<b>ICO</b>	<b>Tendency</b>
<b>Access to subscription</b>	Limited	Public	█
<b>Investors</b>	Mainly instutionals	Public	█

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# Legal Challenges

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Information Transfer  
(Property / Obligation/ Membership  
Rights) from User 1 to User 2

- Digital Property / Digital Ownership?
- Token Transfer = Demise Substitute (Certificate)?
- Legal Relation User / Developer / Smart Contract?
- Written Form Requirement for Assignment?
- Admission from digital property register?

Authorisation from PIK

- Signature as digital signature?
- Liability?

Decentralization

- Values on Blockchain: Contribution Notion?
- Applicable Law and Place of Jurisdiction?
- Decentralized Execution, Decentralized Organisation

Pseudonymity and Anonymity

- Crime Control versus Privacy
- Liability Webinterface Provider

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# FINMA ICO Guidelines (i)

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- **Payment tokens** are synonymous with cryptocurrencies and have no further functions or links to other development projects. Tokens may in some cases only develop the necessary functionality and become accepted as a means of payment over a period of time.
- **Utility tokens** are tokens intended to provide digital access to an application or service.
- **Asset tokens** represent assets such as participations in real physical underlyings, companies, or earnings streams, or an entitlement to dividends or interest payments. In terms of their economic function, the tokens are analogous to equities, bonds or derivatives.

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# FINMA ICO Guidelines (ii)

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FINMA will handle ICO enquiries as follows:

- **Payment ICOs:** For ICOs where the token is intended to function as a means of payment and can already be transferred, FINMA will require compliance with anti-money laundering regulations and the issuer becoming a member of a self-regulatory organization. FINMA will not, however, treat such tokens as securities.
- **Utility ICOs:** These tokens do not qualify as securities only if their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used this way at the point of issue. If utility token functions solely or partially as an investment in economic terms, FINMA will treat such tokens as securities (i.e. in the same way as asset tokens).
- **Asset ICOs:** FINMA regards asset tokens as securities, which means that there are securities law requirements for trading in such tokens, as well as civil law requirements under the Swiss Code of Obligations (e.g. prospectus requirements for shares and bonds).

# FINMA ICO Guidelines (iii)

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Payment Tokens	Utility Tokens	Asset Tokens
Bitcoin, Ether	Pre-paid user fee	Equity Tokens, derivatives, etc.
<b>Means of payment, also according to AML</b> → no security → no banking activity	<b>No security</b> , unless investment instrument, → no means of payment, if <ul style="list-style-type: none"> <li>• Payment is ancillary function to the Utility and</li> <li>• Blockchain is not used for financial purposes</li> </ul>	<b>Security</b> <b>Prospectus necessary</b> → no banking activity → no means of payment
Full AML, KYC, new requirement <b>to become a member of a self-regulatory organisation!</b>	No AML provisions applicable for pure utility tokens	No AML provisions applicable in principle (except for shares of collective investment scheme and bearer shares)

Check [www.wengervieli.ch](http://www.wengervieli.ch) for this summary.



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# FINMA ICO Guidelines (v)

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## Watch out and keep in mind:

- FINMA applies (i) “substance over form” and (ii) “look through” by case evaluation.
- A token could also be a hybrid instrument.
- Qualification would depend on the jurisdiction of the issuer, but not for other public offerings. It is not required to be a public offering.
- FINMA provides in detail on the applicability of banking laws, market infrastructure legislation and the collective investment scheme act!!!
- The enforcement department of FINMA has substantial powers (incl. enforcing the liquidation of an entity, criminal sanctions, etc.).

Therefore...



**Ask your crypto AND regulatory lawyer!!**

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# Know Your Customer (KYC)

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- In most ICOs, each token buyer has to be identified.
- Practical implementation is only limitedly efficient and still law- and FINMA-compliant within video identification according to FINMA circular 16/7.
- Acquire services of a specialised third party, for example Intrum Justitia AG → costs.
- Problems with the technical implementation: high number of persons to be identified in a short period of time
  - Third-party providers must provide additional personal → Costs increase enormously; or
  - Step by step identification of ICO participants and first acceptance of the payments on a escrow account
- Problems with countries where no verifiable identity documents exist.

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# How about funding your share capital with crypto currencies?

Crypto currencies are neither qualified as cash nor accepted by banks on a blocked account, so...

... use crypto currencies as contribution in kind!

Ei Lö Besondere Tatbestände ⇅

- 1 Sacheinlage: Die Gesellschaft übernimmt bei der Gründung gemäss Vertrag vom 01.09.2017 19 Bitcoins (Digitalwährung), wofür 100'000 Namenaktien zu CHF 1.00, liberiert mit je CHF 0.50, ausgegeben werden.

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# Contribution in Kind and its Requirements

In General:

- **Accountability:** must be assests to be included in the accounting and the balance sheet
- **Transferability:** must be freely transferable
- **Availability:** must be available to the company after the registration of the incorporation/capital increase
- **Realization:** must be available to the creditors in case of debt enforcement

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# Other Requirements and Considerations

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- Documentation (Contract for contribution in kind, special reports, audit confirmation)
- Higher costs (preparation of legal documents, audit confirmation)
- Preexamination by Commercial Register recommended
- Sufficient leeway to cater for volatility of crypto currencies

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# Conclusions (i)

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## ICO Pro

- At any time verifiable, unchangeable transaction chain
- Borrowing without future participation of the investors
- Borrowing already without presentable product

## ICO Contra

- New technology, operational risks
- Failure of the project
- Pseudonyms on the Blockchain / Distributed Ledger, no identity of the investors due to the technology

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# Conclusions (ii)

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## ICO Pro

- Cost-effective (in the long run), hardly any involvement of banks, no complicated listing on stock exchanges
- Tokenization of processes facilitates transactions, becomes a cost-effective standard

## ICO Contra

- Civil law uncertainty of what the token represents and what rights it provides
- Regulatory: intervention of regulators



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We are looking forward to  
meet you at our booth in  
OLMA Hall 3

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