

Rechtliche Aspekte bei der Einführung von Crypto Assets

IfZ Sourcing Konferenz 2022

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Crypto Assets

What Are “Crypto Assets”?

...pursuant to FINMA ICO Guidelines

Payment Tokens:

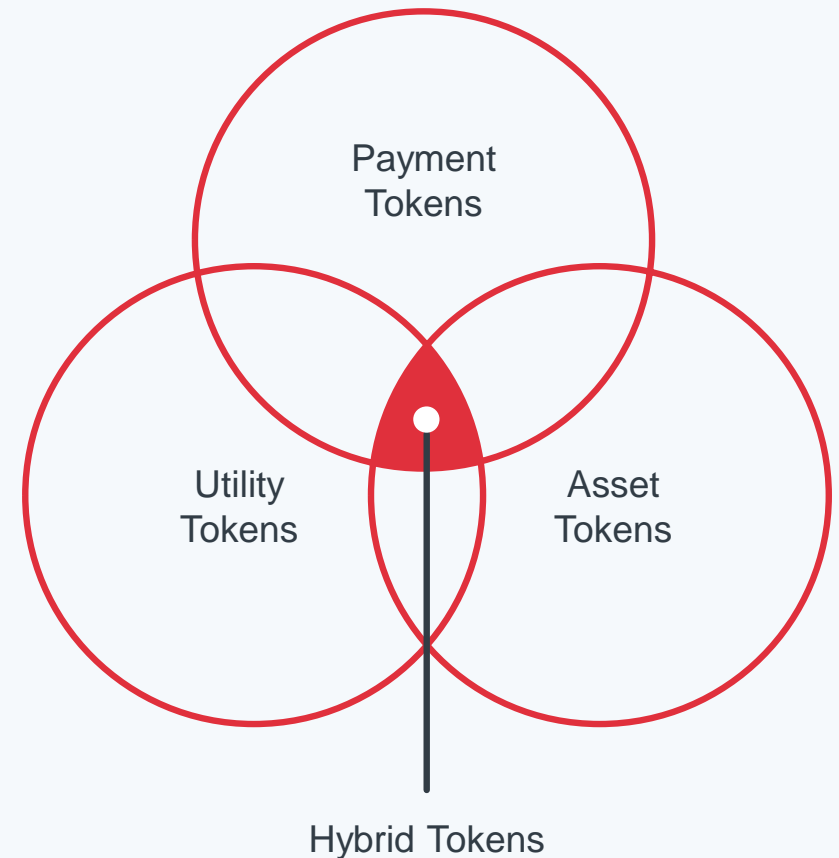
- Payment tokens are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services or as a means of money or value transfer
- e.g. BTC, ETH

Asset Tokens:

- Participation rights in profit or turnover participation
- Corporate membership rights, e.g. voting rights
- Derivative rights (e.g. forward: entitlement to future delivery of currencies, securities)

Utility Tokens:

- Utility tokens are tokens which are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure.



What Are “Crypto Assets”?

...pursuant to MME BCP Paper

BCP Class	1 - Native Utility Tokens No legal counterparty (decentralized ecosystem)				2 - Counterparty Tokens Natural/legal person as counterparty (relative right)					3 - Ownership Tokens Right in rem (absolute right)		
BCP Sub-Class	Basic Tokens	Infrastructure Access Tokens	Application Access Tokens	Application Settlement Tokens	IOU Tokens	Derivative Tokens	Fund Tokens	Equity Tokens	Membership Tokens	Joint-Ownership Tokens	Co-Ownership Tokens	Sole-Ownership Tokens
FINMA Equivalent	Payment Tokens	Payment and/or Utility Tokens			Payment, Utility and/or Asset Token	Asset Tokens			n/a	n/a		
Functionalities	Medium of exchange, unit of account and store of value providing access to an underlying technology (1)	(1) Access to enhanced functionality in infrastructure, i.e. SCS or burning mechanisms, without legal claim against a counterparty	(1) Access to decentralized application or platform without legal claim against a counterparty (2)	(1) (2) Use as P2P settlement instrument on an application / platform	(1) Tokenization of a claim against a legal counterparty (e.g. right to receive funds, services or use infrastructure)	(1) Tokenization of a claim Value derives from an underlying on- or off-chain base value	(1) Tokenization of a fund share	(1) Tokenization of a corporate membership Equity related shareholder's and financial rights	(1) Tokenization of a personal membership	(1) Joint-ownership of an asset, i.e. IP	(1) Co-ownership of an asset, i.e. IP	(1) Sole-ownership of an asset, i.e. IP
Underlying Value	None	None	None	None	Debt / Claim	Derivative (debt)	Fund share	Equity share	Personal membership right	Ownership of an asset	Ownership of an asset	Ownership of an asset
Examples	Bitcoin, Bitcoin Cash, Litecoin, Monero, ZCash	Ether, Ether Classic, Cardano, Lisk, ICON, EOS	Wings	Siacoins, Mysterium, Filecoin	Lykke Colored Coins, "Utility Tokens" with counterparty	Modum	Blockchain Capital	Daura C-Shares	tba	tba	tba	tba

Token Issuance

Token Issuance: Regulatory Implications

Payment Token	Utility Token	Asset Token
<ul style="list-style-type: none"> • no securities • no banking activity • means of payment according to AMLA 	<ul style="list-style-type: none"> • no securities (except if investment function or non-functional) • no banking activity • no means of payment 	<ul style="list-style-type: none"> • securities (prospectus requirement) • no banking activity • no means of payment
<p><u>AMLA-subordination</u></p> <ul style="list-style-type: none"> • SRO membership • Outsourcing FI activity <p><u>Obligations:</u></p> <ul style="list-style-type: none"> • KYC • SoF / SoW • documentation obligation 	<p>No AMLA-subordination</p>	<p>No AMLA-subordination</p>



Custody

Custodial vs. Non-Custodial Wallet

Custodial wallet

Description

- Safekeeping of private keys by the custody provider
- Custody provider has full control over client's tokens
- Transactions not in real time (delayed)
- Backup/restore in case of loss of access to the tokens is possible

Example

Bitcoin Suisse

Regulation

BankA, AMLA, FinSA, FinIA depending on the qualification of a token

Non-custodial wallet

Description

- Client safekeeps private key using the provider's software
- Client has full control over his private keys/tokens
- Transactions in real time
- Backup/restore in case of loss of access to the tokens is difficult

Example

Metamask

Regulation

In general: none

Exception: AMLA (depending on the tokens qualification)

Segregation: On-Chain vs. Off-Chain

On-chain

Description

Tokens are held per clients on a separate blockchain address

Segregability

Provided address is at hand for the client at all time

Banking Act

No license requirement, provided address is always at hand and no interest is paid

Off-chain

Description

Tokens from multiple clients are pooled on the same blockchain address (omnibus)

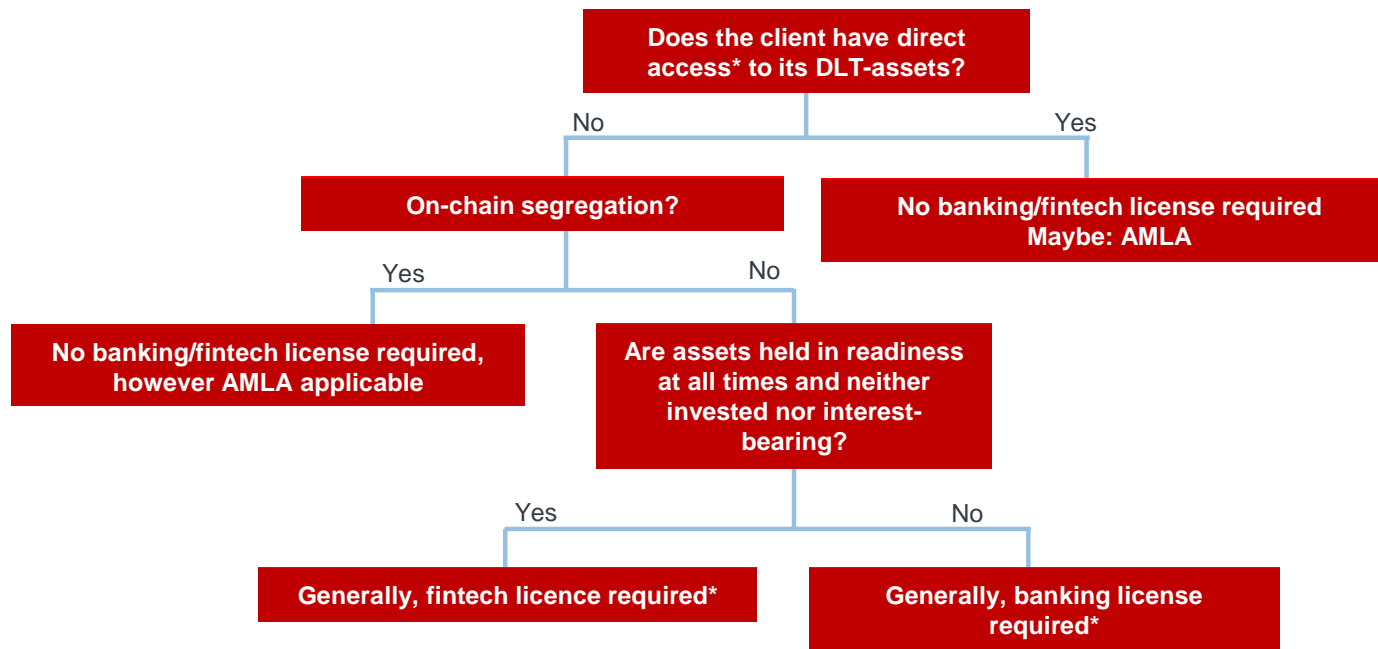
Segregability

Provided address is at hand for the client at all time

Banking Act

Banking or fintech license required unless individual assignability is provided (e.g., NFT vs. fungible payment tokens)

Legal Implications



* Direct access:

- Solely the client holds the PIK
- Client and custody provider hold the PIK
- Client has required Key of a MultiSig Wallet

No direct access:

- Client does not have sufficient keys to dispose alone *and*
- Custody provider has sufficient keys to dispose alone

* Subject to exceptions (in particular: consideration from contract; regulated customers etc.)

Regulation: Payment Token Custody

License / Supervision	Non-Custodial	Custodial, on-chain segregation	Custodial, off-chain segregation	FIAT custody
AMLA (Anti-Money Laundering Act)	Not required, unless lasting business relationship and assistance with transfer (art. 4 sec. 1 lit. b AMLO)	●	Only if exceptions are applicable, in particular: banks as clients	Only if exceptions are applicable, in particular: processing account (60d) & no forex trading (BankO 5.III.c) Sandbox (BankO 6.II) Bank guarantee (BankO 5.III.f)
Sandbox (BankO 6.III): - Readiness at all times - No interest	Not required	Not required	● (up to CHF 1m)	● (up to CHF 1m)
Fintech license (BankA 1b) - Readiness at all times - No interest	Not required	Not required	Only if exceptions are applicable, in particular: banks as clients	● (up to CHF 100m)
Bank license (BG 1a)	Not required	Not required	●	●

Trading / Transactions

Overview Centralized Trading Setups

	Payment Tokens	Utility token	Asset token
Facilitation of Matching	Not regulated	Not regulated	Not regulated
Bilateral Trading	Anti-Money Laundering Act is not applicable outside professional capacity	Not regulated	Securities Firm License required for: <ul style="list-style-type: none"> • Trading in securities in own name for account of clients • Independent Traders with an annual trading volume of 5 billion CHF; or • Market Makers / Liquidity Providers that publicly offer prices for individual Asset Tokens, either upon request or on a permanent basis
Independent Traders (without clients) and Platform Providers (Gateway)	Anti-Money Laundering Act is applicable to professional traders and Trading Platform Providers (SRO membership)		
Multilateral Trading (Direct matching of Participants)	Anti-Money Laundering Act is not applicable. However, KYC Sanction List Screening is required.	Not regulated	Exchange Platform qualifies as an OTF or MTF (can only be run by a Securities Dealer, Bank, or Trading Venue)



Serving your Clients

Challenges & Options

In-house Solutions: Selected Challenges

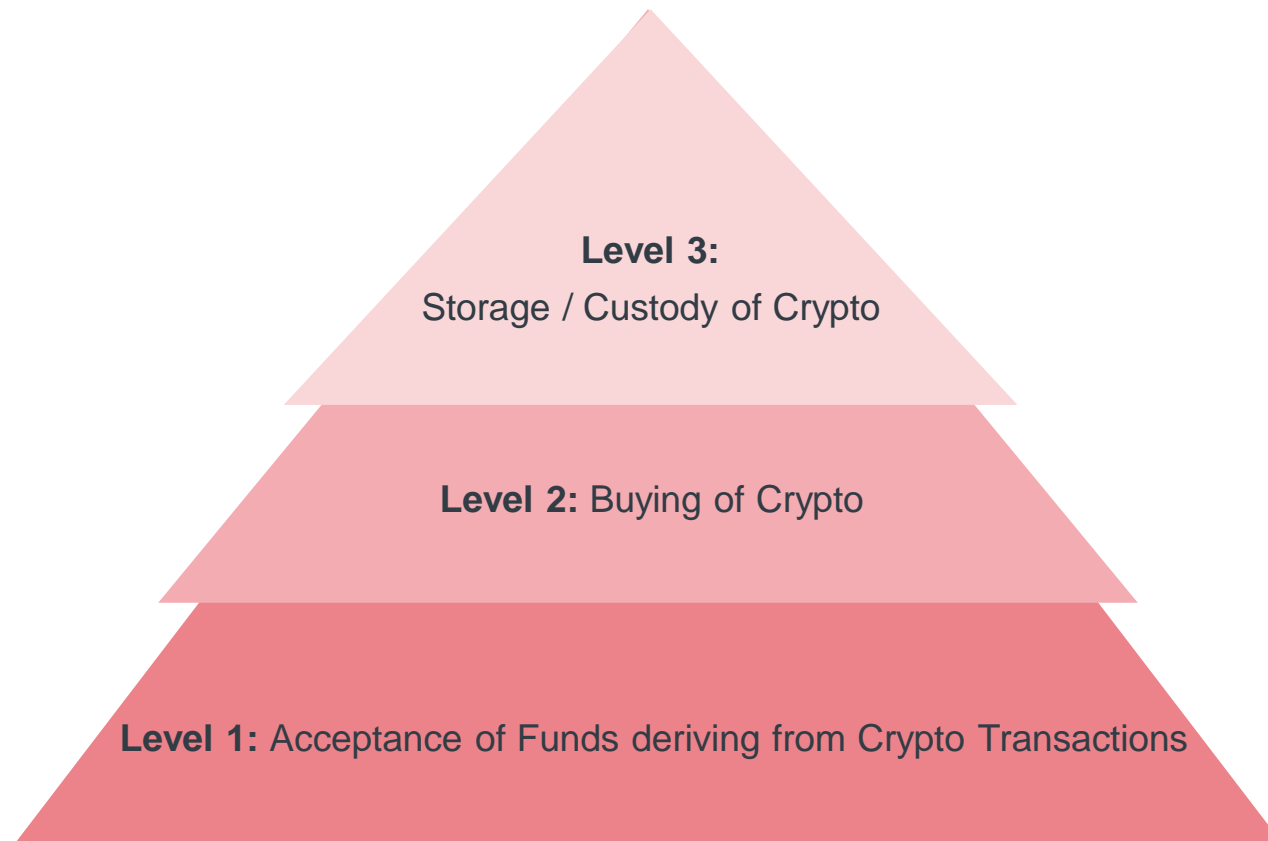
- Establishment of **internal know-how** (regulatory, tech, tax)
- BCP risk assessment
- Establishment of internal **risk & compliance processes**
- Implementation & adaptation of **AML risk processes and rulebook** (crypto in, crypto out; source of funds, source of wealth)
- Implementation of **chain analysis tool** provider
- **Custody**/Subcustody & **segregation** setup
- Clarifications re **capital adequacy requirements**
- Assessment **data protection requirements**
- Connection to **core-banking system**
- Assessment re potential **foreign activities**
- Definition of **pricing**
- Asset management services (crypto assets)
- Offering of non-banking services (country lists)
- **FINMA notifications**
- Amendments to **Articles of Association**, partnership agreements, regulations, etc.
- Amendments of T&C
- **Broker/exchanges** onboarding
- Drafting of **contracts**
- Clarification of tax situation

Partner up: Digital Asset Banking Services by Other Banks (B2B)

- Accounts
- Brokerage
- Integration of custody & trading solutions into traditional banking process
- Asset management (diversification of investment portfolios with digital assets)
- Staking
- Lending
- Asset tokenization
- Implementation of specific due diligence & monitoring framework / AML Tool
- Integration of internal control system

- ✓ FINMA-approved regulatory compliant solutions
- ✓ Cost-efficiency
- ✓ Fast time-to-market
- ✓ Access to digital asset ecosystem & participants
- ✓ Asset class / product expansion: OTC options, investment/structured products, other financial products, Lombard loans)
- ✓ Optional expansions (e.g., NFT marketplaces)
- ✓ Depending on banking partner, access to stablecoin

Custody and Subcustody Models



Outsourcing of Crypto Custody / B2B Services

Qualification of Custody Services	Clarification of the envisaged Processes/Documentation
<ul style="list-style-type: none"> ▪ Is the service obtained through the bank to be qualified as a service? ▪ Is this service the (permanent and independent) outsourcing of a task that is part of the bank's business activity? ▪ Is it an outsourcing of an essential function of the bank? ▪ Does this also affect data protected by banking law (e.g., Client Identifying Data)? ▪ Is it a case of outsourcing abroad? 	<ul style="list-style-type: none"> ▪ Clarification of bank-internal processes for outsourcing activities (responsibilities, outsourcing policies, integration in internal control system, etc.). <ul style="list-style-type: none"> ➤ To be performed by competent unit of the bank ▪ Clarification of the service provider's processes for compliance with requirements pursuant to FINMA Circular 2018/03. <ul style="list-style-type: none"> ➤ To be requested from service provider

- **Outsourcing abroad: Not possible with FinTech license (BankO 14f 4.a); segregability must also be ensured in custody pursuant to BankA**
- **Creation of a custody outsourcing inventory**
- **Verification of adequacy/compliance of processes provided by service provider**
- **Drafting / Review of outsourcing agreement**



THANK YOU!

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