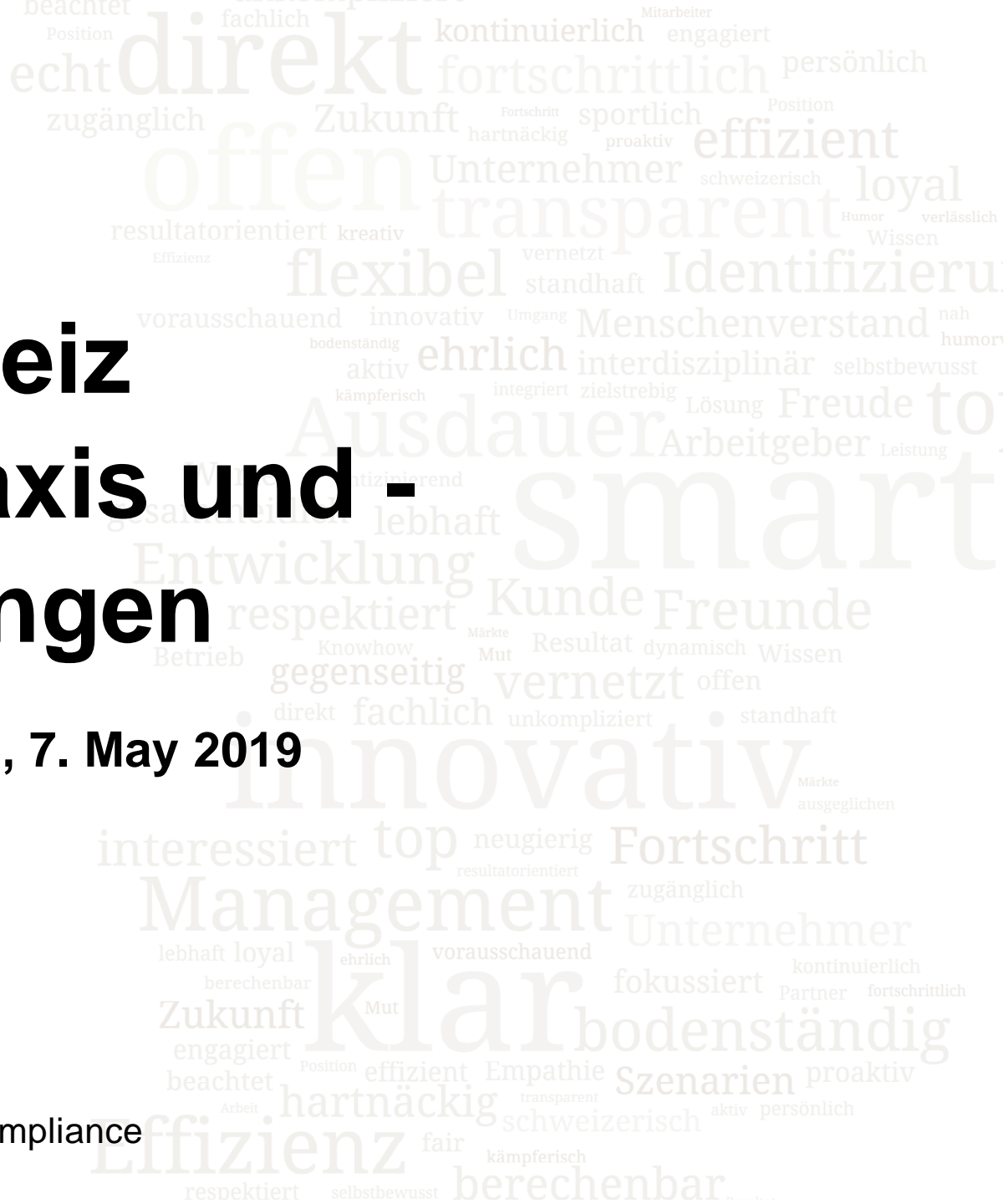


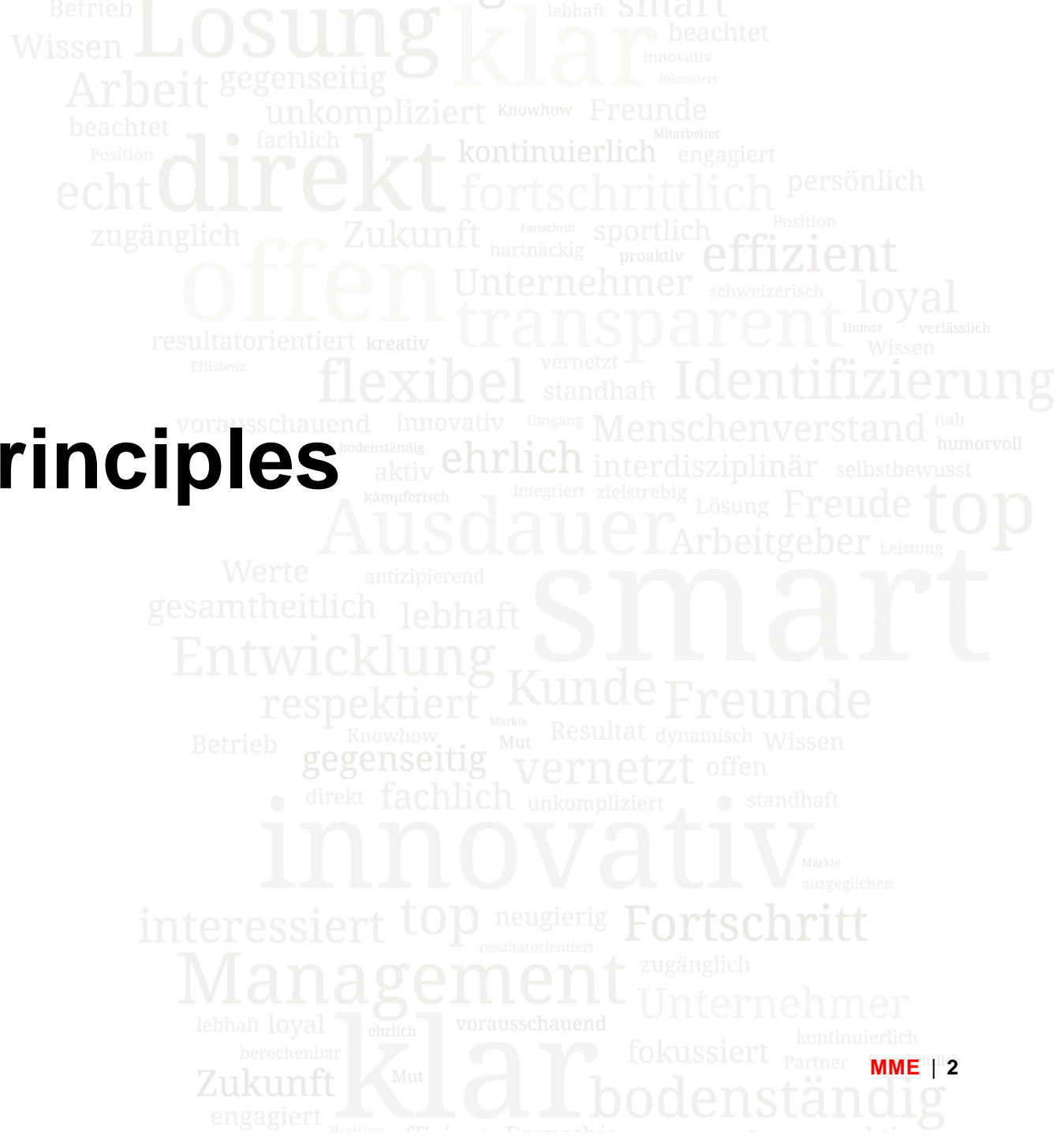
DLT Schweiz Rechtspraxis und - entwicklungen

Webinar Blockchain, 7. May 2019

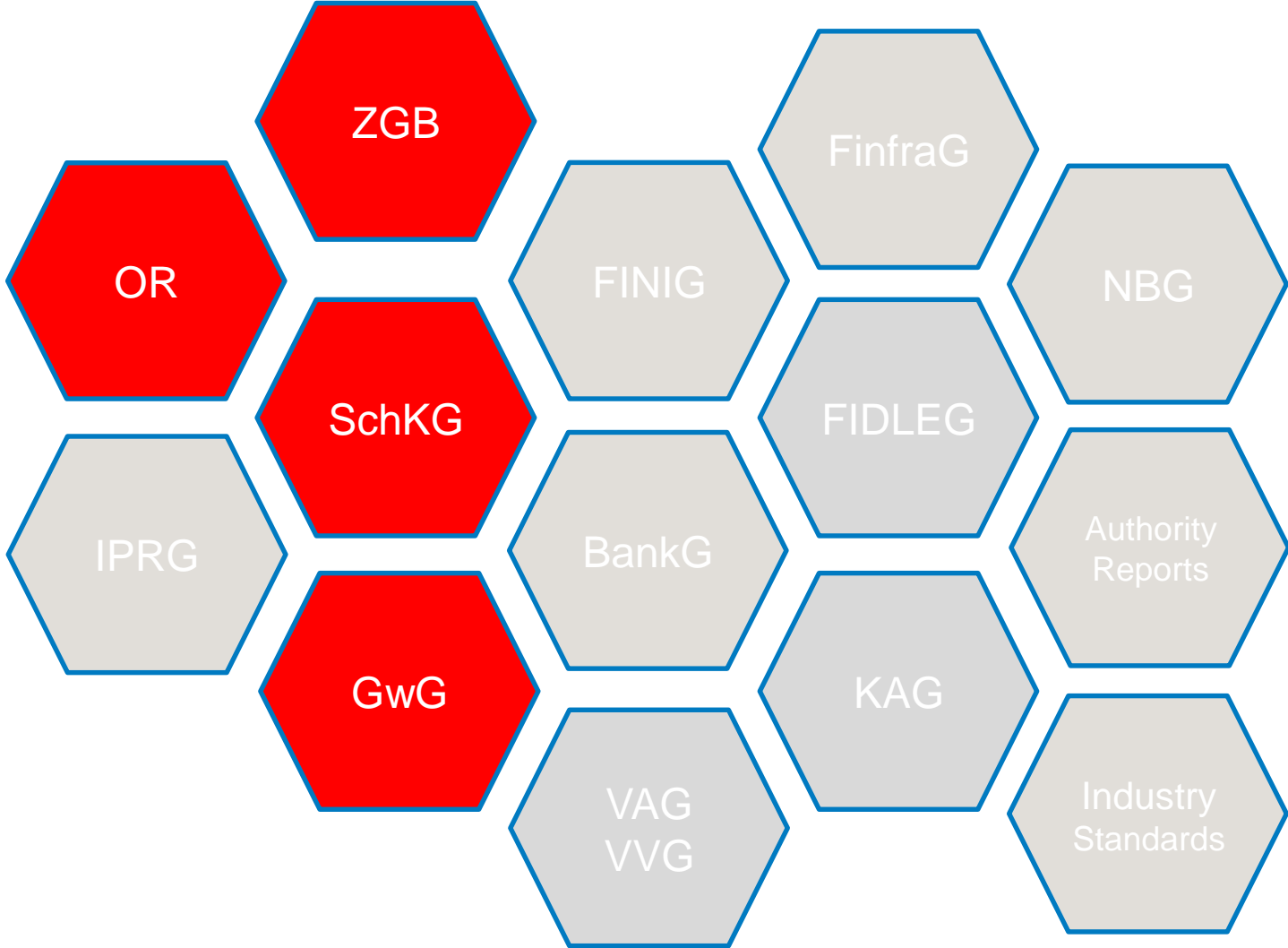
Dr. Andreas Glarner



Legal Principles

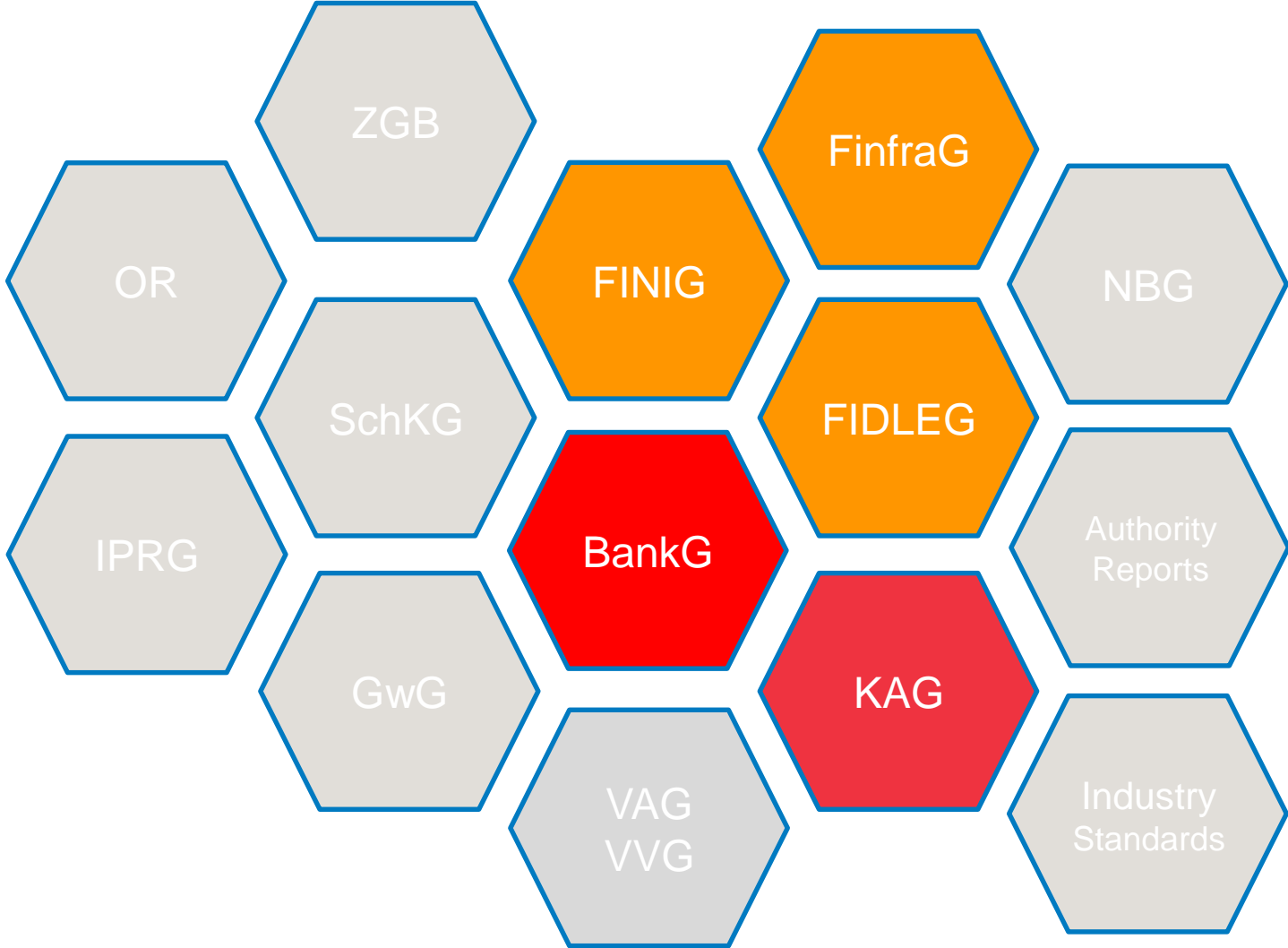


Relevant Norms

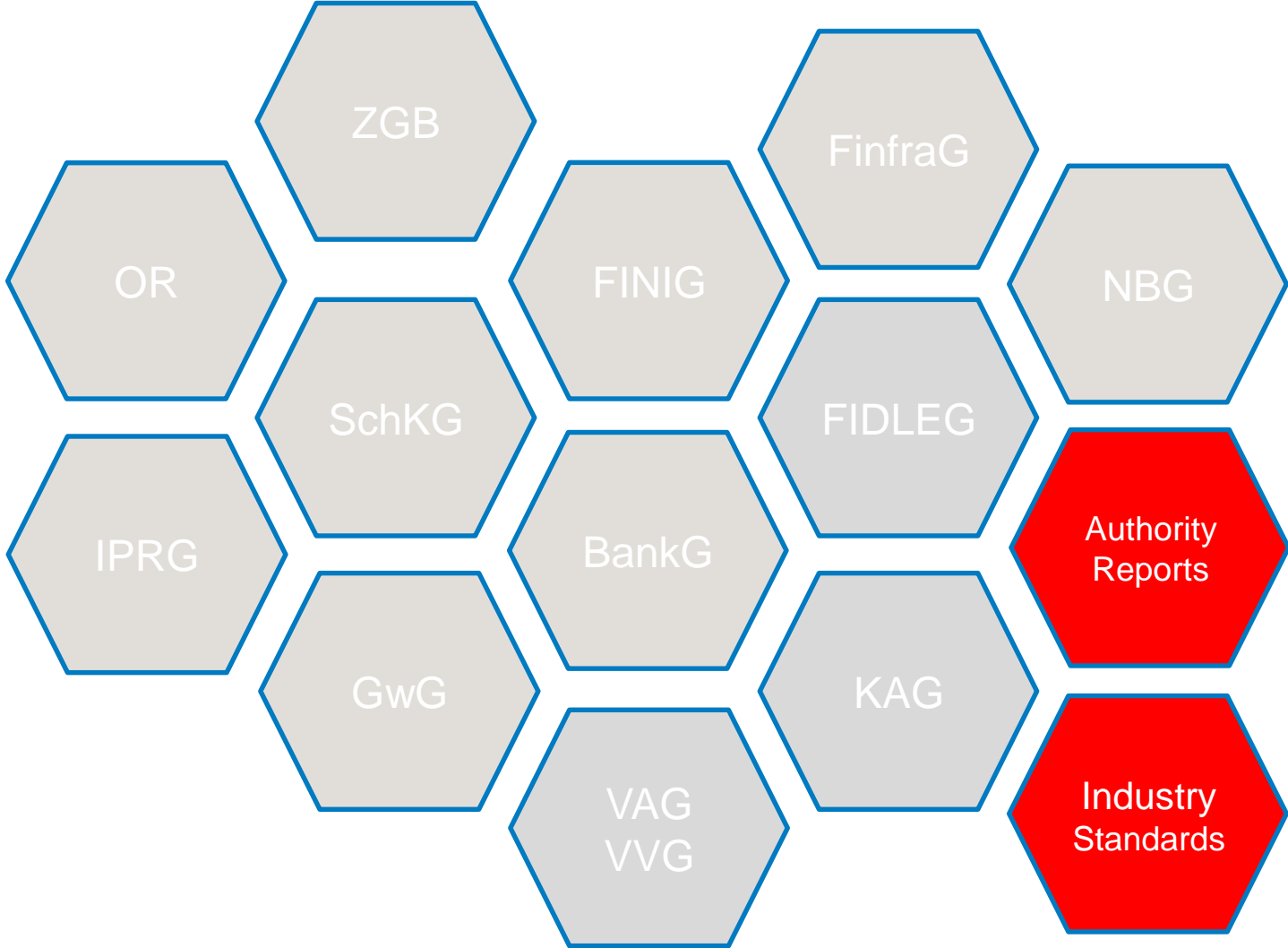


*Folien zu DLT-Framework basierend auf Präsentation von Arie Gerszt, SIF.

Relevant Norms



Relevant Norms



DLT-Legislative Adjustment



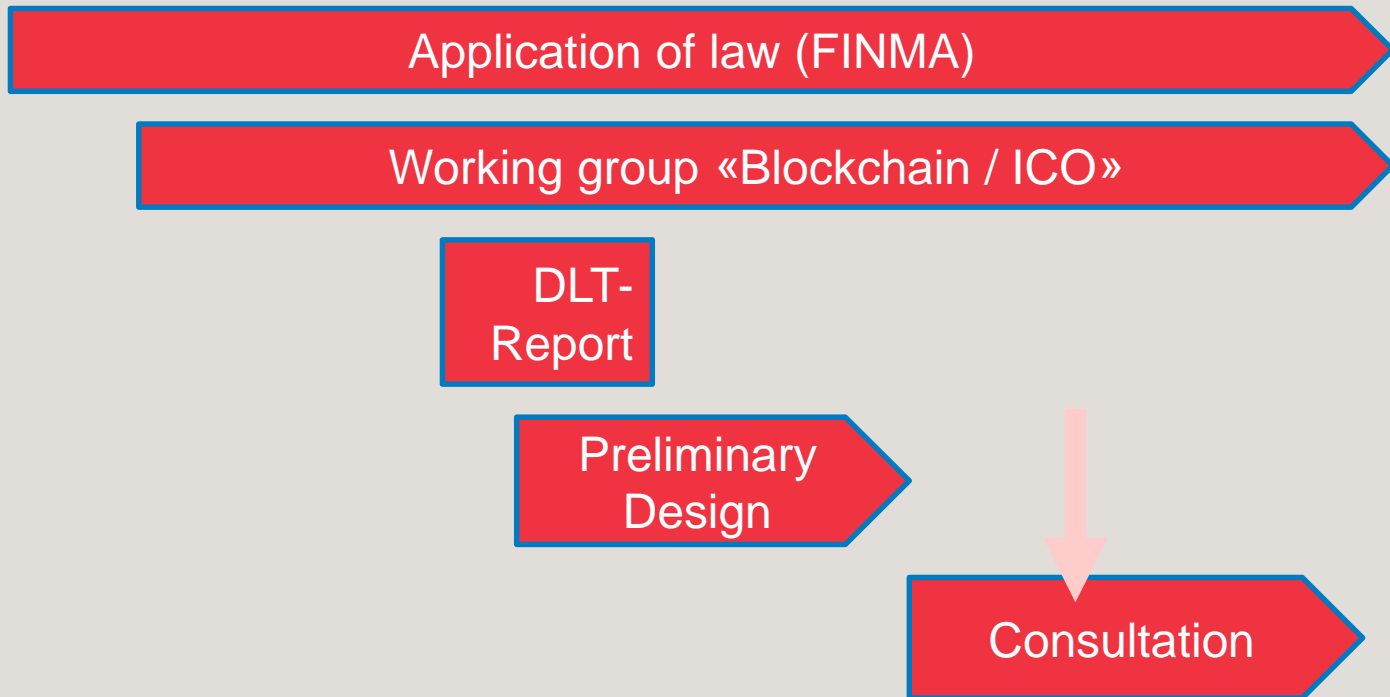
Framework | Blockchain – DLT

Work group «Blockchain / ICO»

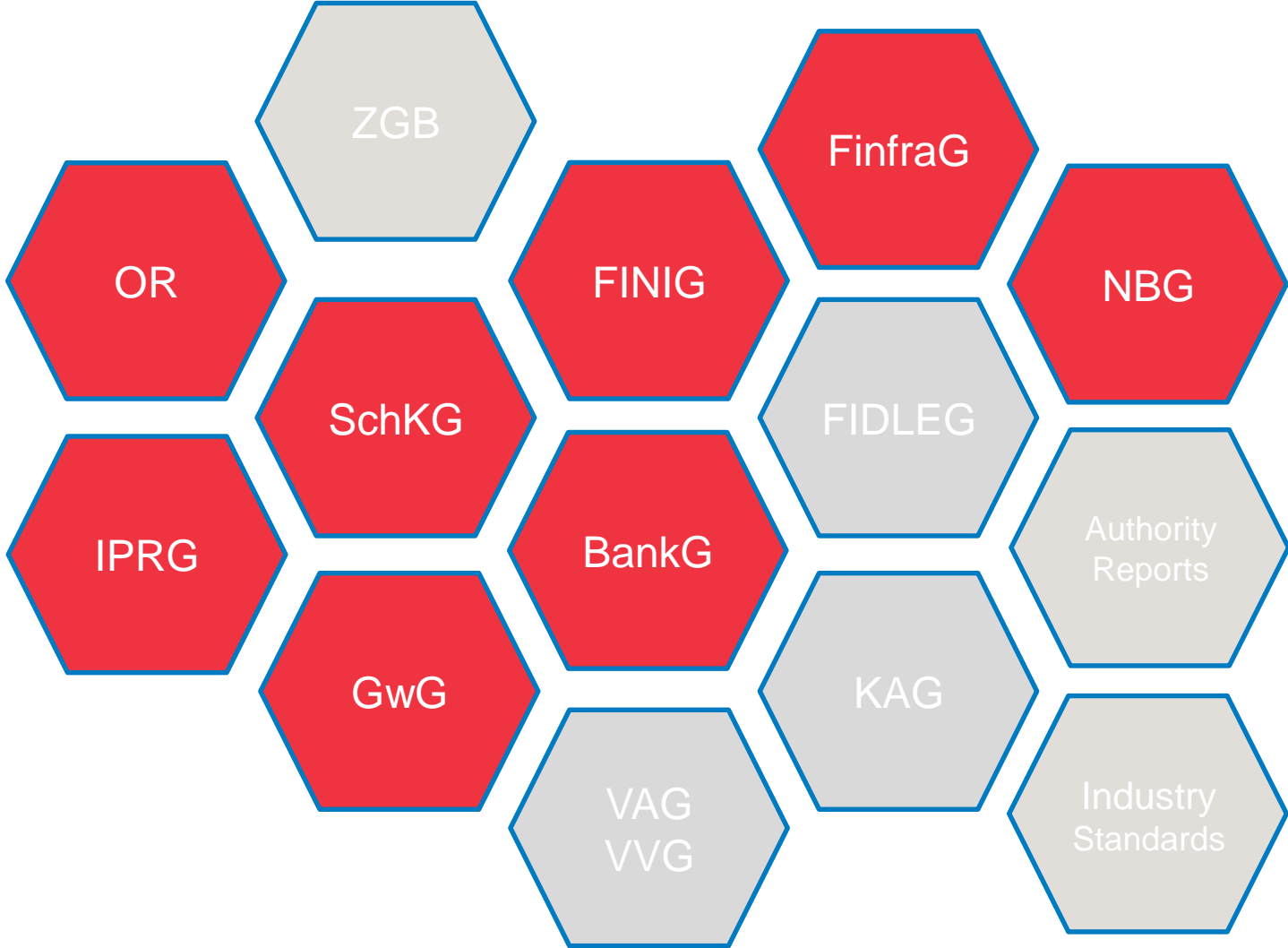
- Blockchain/DLT – leads to "fundamental" questions
- Work group (from January 2018)
 - Staatssekretariat für internationale Finanzfragen (SIF)
 - Bundesamt für Justiz (BJ)
 - Eidgenössische Finanzmarktaufsicht (FINMA)
 - Schweizerische Nationalbank (SNB)
 - Bundesamt für Polizei (fedpol)
 - Staatssekretariat für Wirtschaft (SECO)
 - Eidg. Zollverwaltung (EZV)
- Focus on financial sector specific applications
- Goal: Increasing legal certainty, maintaining the integrity of the financial centre, safeguarding the attractiveness of the location
- Exchange with industry (informal consultation)

Framework | Overview

Analysis / Background work



Norms in Focus



Outlook

OR

- Transmission of Token
- Qualified electronic value right
- Requirement for DLT Registers?

SchKG

- Segregation of crypto assets in case of bankruptcy

FinfraG
(FINIG)

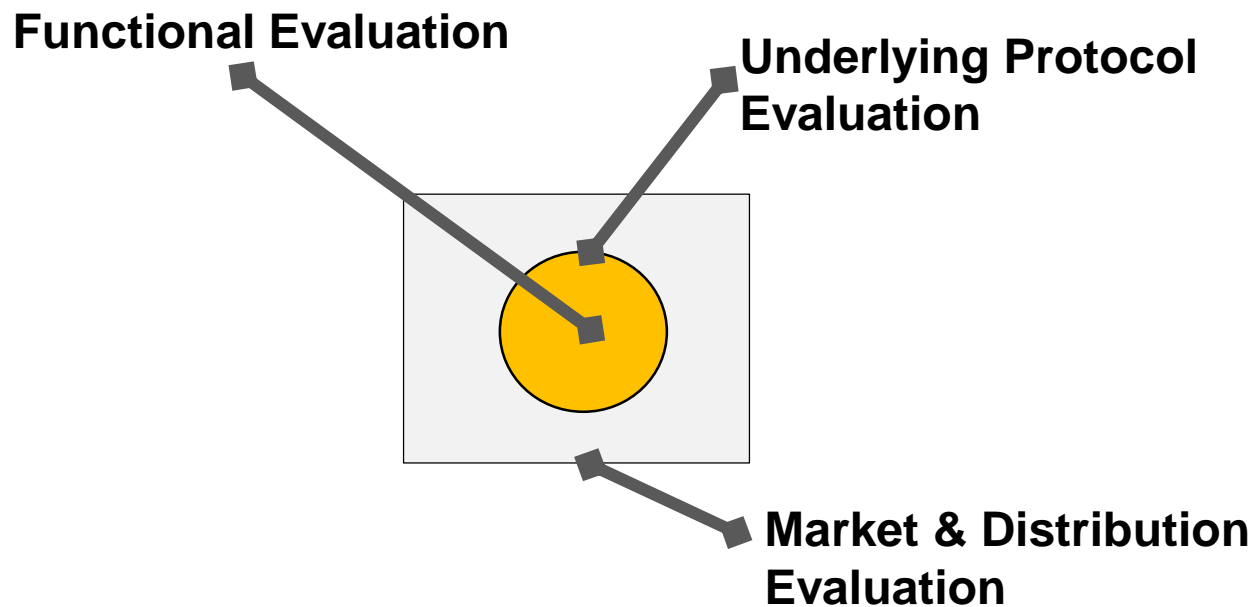
- New licence category (DLT trading systems)
- Subordination situation «investment firm»»

Increase legal certainty

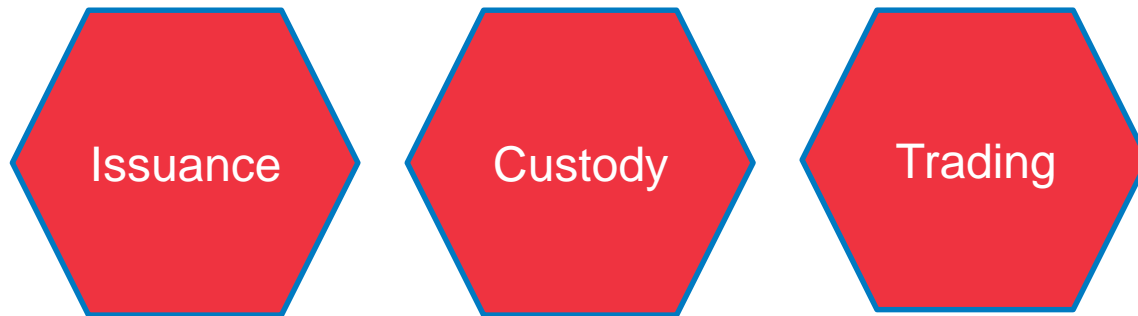
Additional
Regulation

General Legal Challenges when advising in DLT Setups

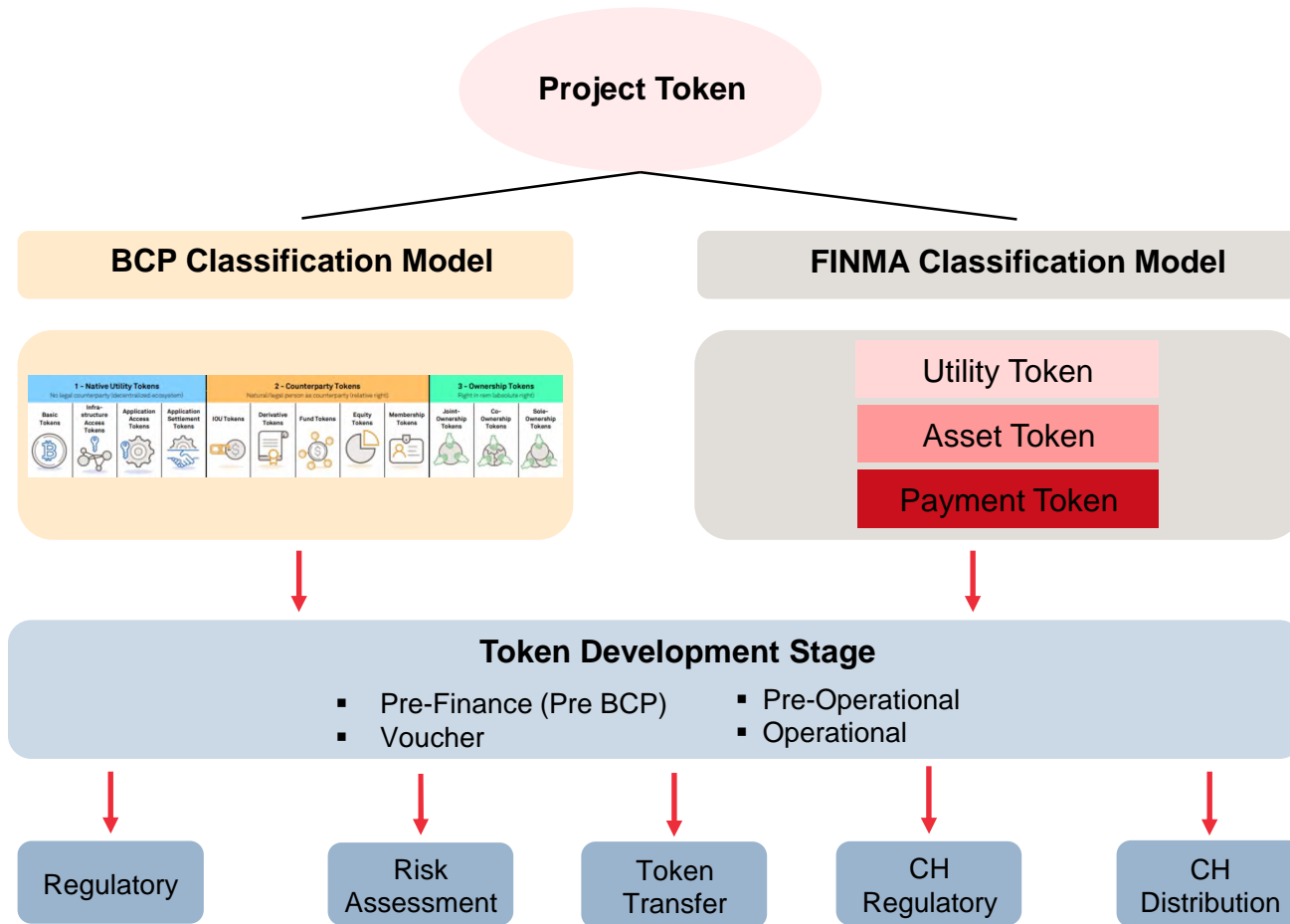
Factual Challenges related to DLT



Legal Challenges related to DLT















Token Classification



BCP Classification

Functional BCP Classification Overview

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) 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	(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

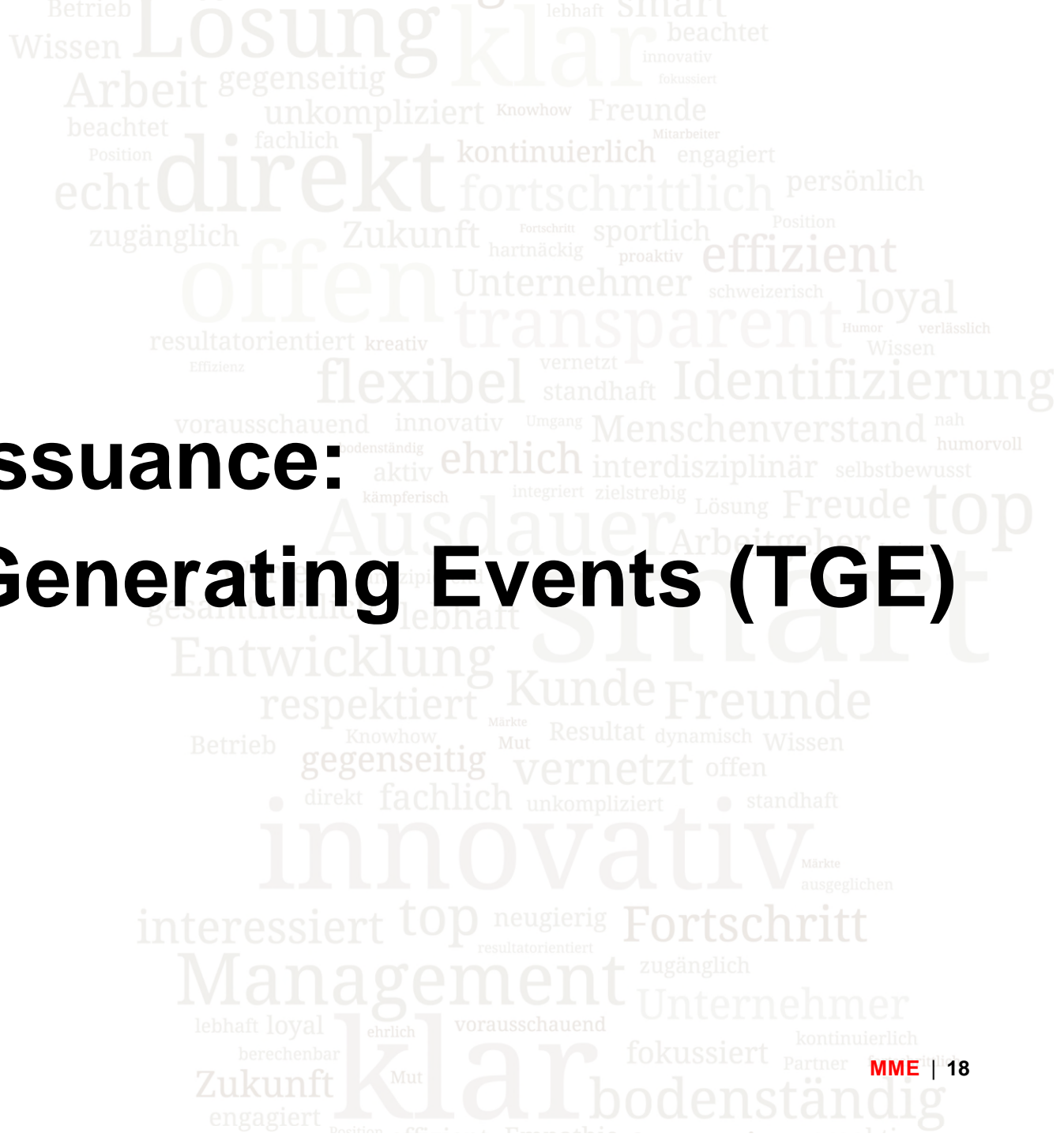
FINMA Token Classification

- **Payment Token**
 - 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
- **Utility Token**
 - Utility tokens are tokens which are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure.
 - e.g. ETH (e.g. Launch)
- **Asset Token**
 - Participation rights in profit or turnover participation (e.g. digital participation certificate)
 - Corporate membership rights, e.g. voting rights (e.g. LKK)
 - Derivative rights (e.g. forward: entitlement to future delivery of currencies, securities)
 - Non-functional Utility Token

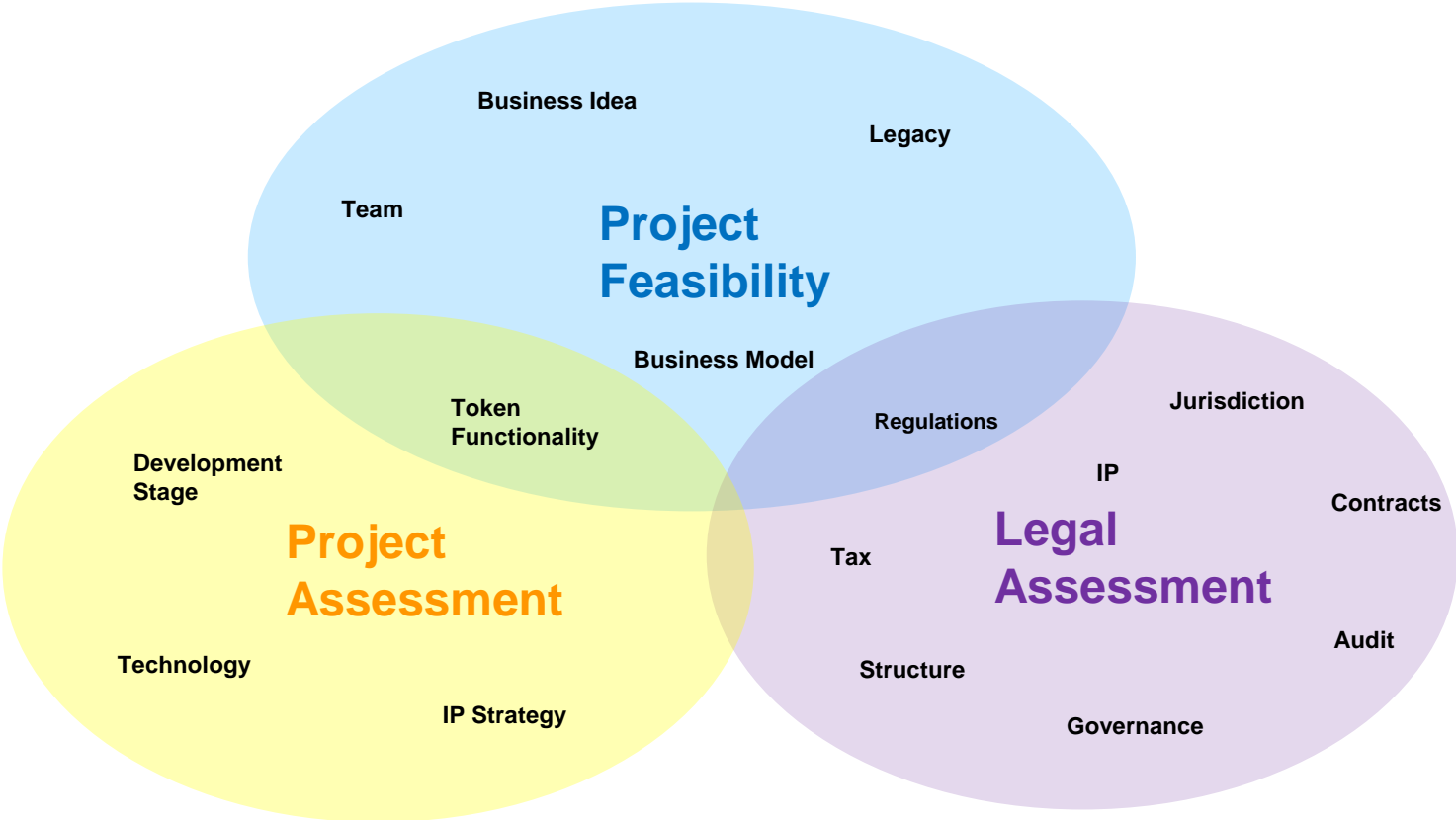
Token Classification

	Utility Token	Payment Token	Asset Token
Native Token (BCP 1)	Basic, Infrastructure, Application Access & Application Settlement Token with use in a decentralized blockchain system		
Counterparty Tokens (BCP 2)	Digital Vouchers & Means of Payment		Receivable, bond, derivative, fund, participation or membership
Ownership Tokens (BCP 3)	Digital Representation of physical ownership		

Token Issuance:
Token Generating Events (TGE)



Overview



Legal Assessment

Legal Assessment

Regulations

- CH
 - AML
 - Security Regulations
 - Banking Regulations
 - Collective Investment Regulations
- Target Markets
- Active / passive distribution

Jurisdiction

- Which jurisdiction is suitable?
- Jurisdiction of buyer?
- Regulations
- Reputation
- Timeline

Contracts

- ECA
- T&C
- Distribution
- Existing Agreement
- Operational Contracts

Tax

- CH
- TGE Process
- VAT
- Withholding Tax
- Individual Tax (Team Members)

Audit

- Technical SCS Audit
- Legal SCS Audit

Structure

- AG / GmbH
- Foundation
- Association
- Existing structure

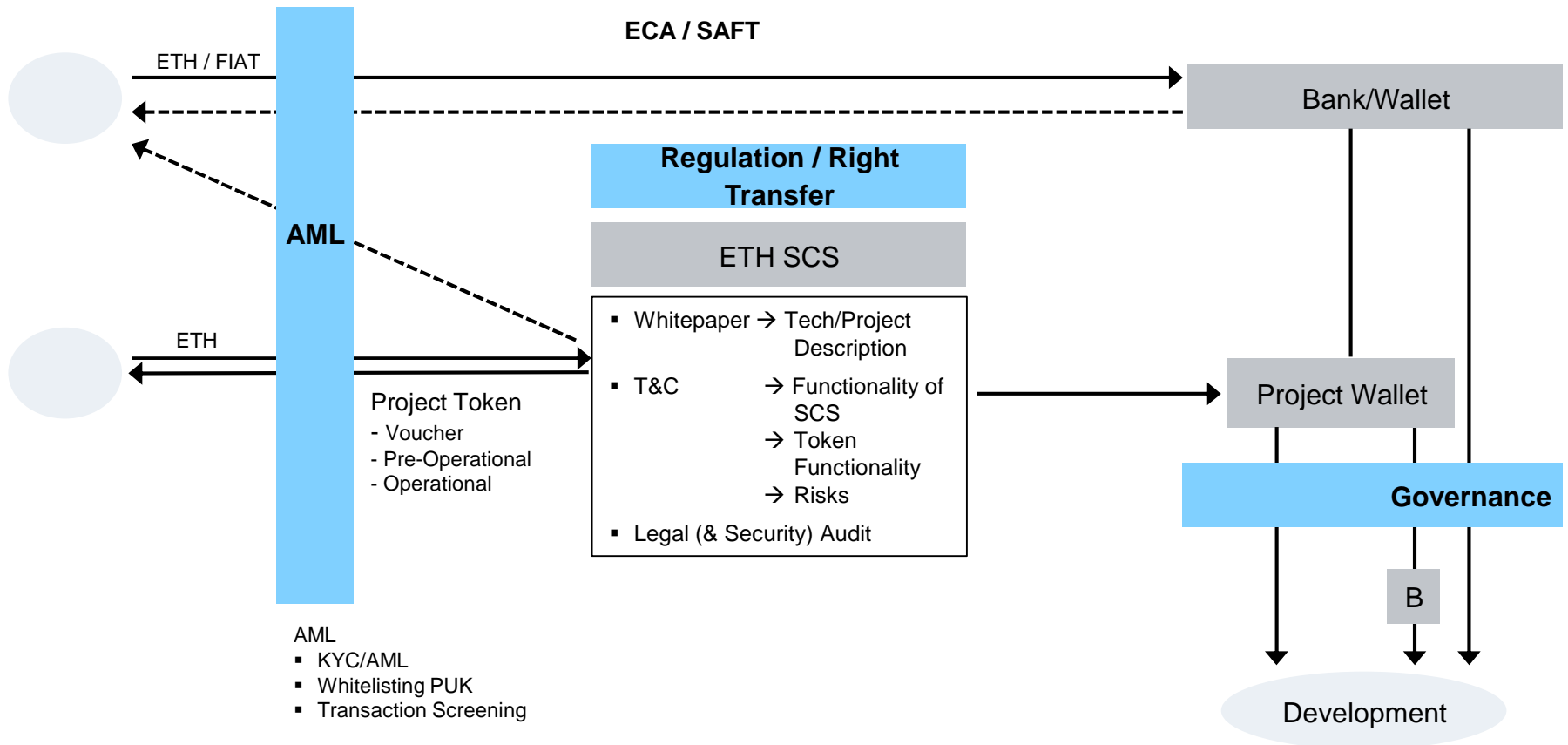
Governance

- Post TGE
- Founder
- Wallet

IP

- Patents / Trademarks
- OSS Licenses
- IP Transfer / Licenses
- Development

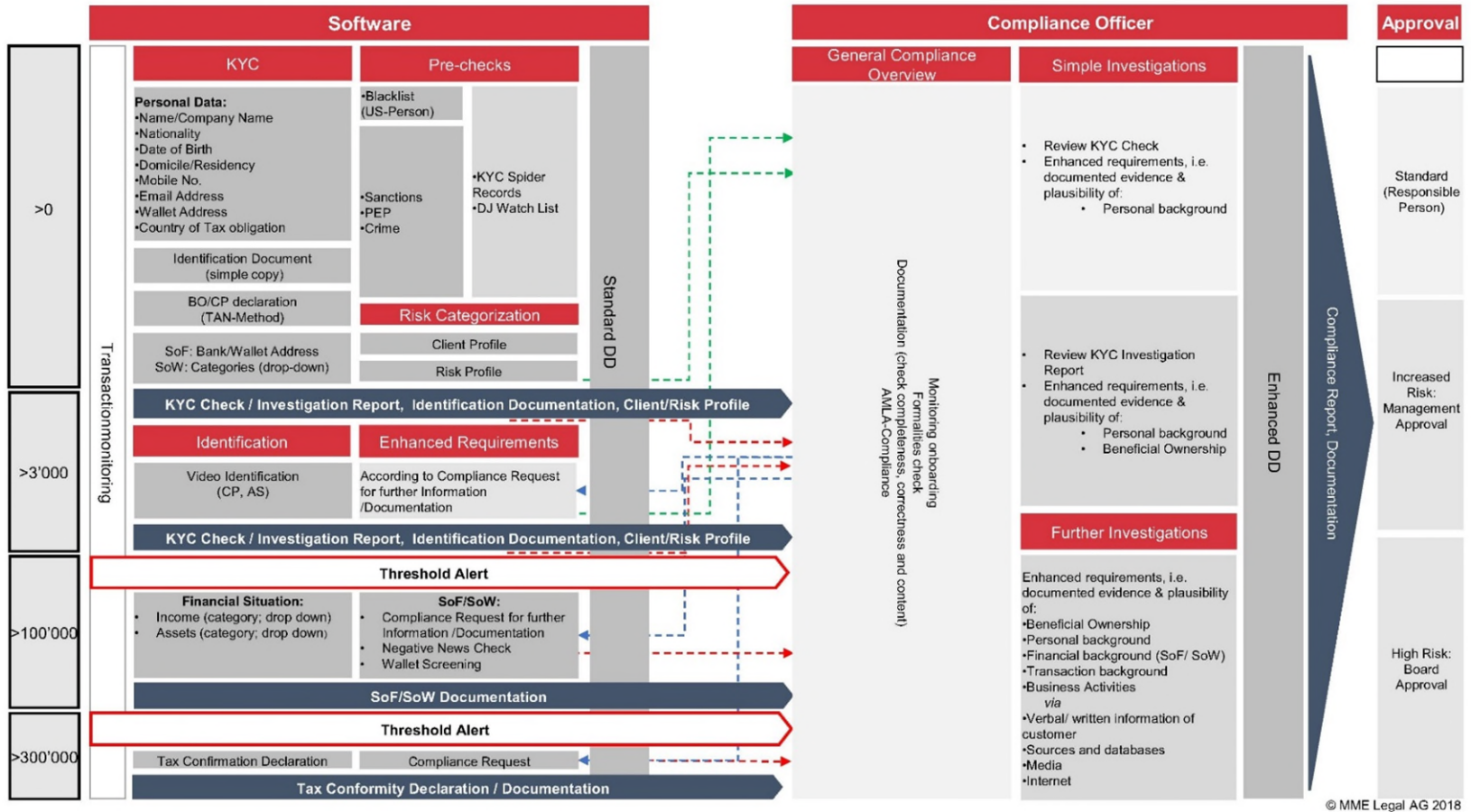
Token Issuance: Regulatory Pressure Points



AML

Overview AML Program TGE

Oktober 2018



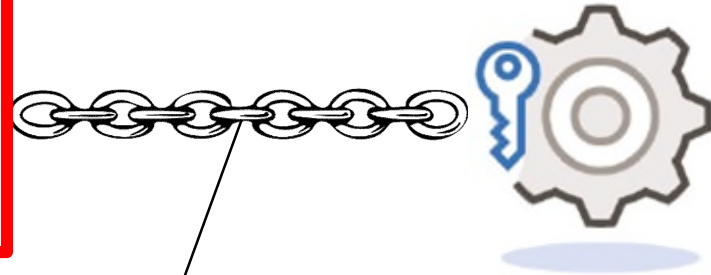
© MME Legal AG 2018

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 (in some circumstances prospectus requirement) • no banking activity • no means of payment
<p>AMLA-subordination</p> <ul style="list-style-type: none"> • SRO annexation • Outsourcing FI activity <p>Obligations:</p> <ul style="list-style-type: none"> • KYC • SoF / Sow • documentation obligation 	<p>No AMLA-subordination</p>	<p>No AMLA-subordination</p>

Civil Law Pressure Points: Synchronisation

Right to claim and/or right of membership



Aim: Connection between right and token

- holder of the token= holder of the right
- token transmission= transfer of the right

Specifications:

- No (or fulfilment of) written form requirements
- If possible no qualification as FI

Synchronisation: Token Types



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Synchronisation: Solution Approaches



Securities (OR 965)

document of ownership
required

Token = security
Minority opinion

**Statement of ownership
of security(s)**

- Global certificate or securities held in collective custody with central party
- **Disadvantage: basic FI as defined by AMLA**

Value right (OR 973c)

Written form required for
the transfer

Contract transfers

- Securing transfer by means of terms of use

**Assignment with
electronics signature**

- elaborate

Blank/global assignment

Book-entry securities
(BEG)

FI required as depository

Token = Bucheffekte

- Qualification of wallets as securities accounts

Token = instruction

- Token transfer = instruction to custodian

Vorschlag: «DLT-Wertrecht» (nArt. 973d ff. OR)

- «**Wertrechte mit Wertpapiercharakter**» die in DLT-Register eingetragen sind und nur über dieses geltend gemacht und übertragen werden können (nArt. 973d Abs. 1 OR)
- Kriterien für «DLT»: Inhalt des Rechts festgehalten; Funktionssicherheit und Datenintegrität; Einsehbarkeit der Daten (vgl. nArt. 973d Abs. 2 OR)
- Transport-, Legitimations-, Präsentationsfunktion (vgl. nArt. 973e Abs. 1 und 2 OR)
- Schutz des gutgläubigen Erwerbs (nArt. 973e Abs. 3 OR)
- Pfandrechte und Nutzniessung (nArt. 973f OR)
- Kraftloserklärung (nArt. 973g OR)

Custody



Overview Custody Setups

	Payment Tokens	Utility Token	Asset Token
Accepting Token Deposits (Provider has Access to Tokens)	<p>Anti-Money Laundering Act is not applicable if</p> <ul style="list-style-type: none"> • Tokens are not pooled (separate wallet address for each client) ; • Tokens are not fungible, for example ERC 721 standard ; or • Tokens are pooled for 60 days or less • Provider accepts public deposits on a non-commercial basis (in total less than 1 million Swiss Francs) 	<p>Not regulated</p>	<p>Securities Dealer License may be required (depending on setup)</p> <p>*DLT-Handelssystem</p>

Vorschlag: Aussonderung (nArt. 242a f. SchKG)

nArt. 242a Abs. 1 und 2 SchKG

1 Die Konkursverwaltung trifft eine Verfügung über die Herausgabe kryptobasierter Zahlungsmittel und von DLT-Wertrechten gemäss Artikel 973d OR, welche von einem Dritten beansprucht werden.

2 Der Anspruch ist begründet, wenn der Gemeinschuldner die Verfügungsmacht über die kryptobasierten Zahlungsmittel und die DLT-Wertrechte für den Dritten innehat und diese dem Dritten jederzeit im Register individuell zugeordnet sind.

Analoge Regelung zu Daten im Allgemeinen (nArt. 242b SchKG)

Trading



Overview Centralized Trading Setups

	Payment Tokens	Utility token	Asset token
Facilitaion of Matching	Not regulated	Not regulated	Not regulated
Bilateral Trading Independent Traders (without clients) and Platform Providers (Gateway)	<p>Anti-Money Laundering Act is not appicable to Independent Traders</p> <p>Anti-Money Laundering Act is not appicable to Platform Providers (SRO membership)</p>	Not regulated	<p>Securities Dealer License required for:</p> <ul style="list-style-type: none"> • 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
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)

Vorschlag: DLT-Handelssystem (nArt. 73a ff. FinfraG)

OHS	MHS	DLT-Handelssystem
<p>Multilateraler, diskretionärer Handel von Effekten & a. Finanzinstr. <i>oder</i> Multilateraler Handel von Finanzinstrumenten <i>oder</i> Bilateraler Handel von Effekten & a. Finanzinstr.</p>	<p>Multilateraler, nicht-diskretionärer Handel von Effekten</p>	<p>Multilateraler, nicht-diskretionärer Handel von «DLT-Effekten» (sowie Zahlungs- / Nutzungstokens)</p> <p>Voraussichtlich ausgenommen: Derivate & «Privacy Coins»</p>
<p>Retail & FIs als Investoren</p>	<p>Nur FIs als Investoren</p>	<p>Retail & FIs als Investoren</p>
<p>Nur Handelstätigkeit</p>	<p>Nur Handelstätigkeit</p>	<p>Handels- und Nachhandelstätigkeit integriert</p>

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MME has been advising clients on regulatory, compliance and tax issues relating to blockchain and crypto assets since 2013. The focus is on protocols and blockchain-based FinTech applications.

Our customers include protocol and application developers, ICO-financed companies, exchanges, wallet providers, as well as established companies wishing to enter the Crypto Asset Space.

We currently manage over 100 blockchain projects.

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Dr. Andreas Glarner works with international companies in the technology and financial sector. He is co-heading the MME DLT/FinTech Team, focusing on advising clients in the DLT / Blockchain / FinTech space. He has been an advisor to a whole range of the most reputed projects in the field, advising both on technological as well as regulatory matters.

Andreas Glarner has published various articles on topics related to his practice areas and is a regular speaker at conferences and meetups.