



EU Company Law

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Principles of Corporate Law

Lecture 6

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**University of
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Faculty of Law

2022 Conference on Sustainability in Commercial and Financial Law

November 9, 2022

14:00 – 18:00 (Welcome Desk: 13:30)

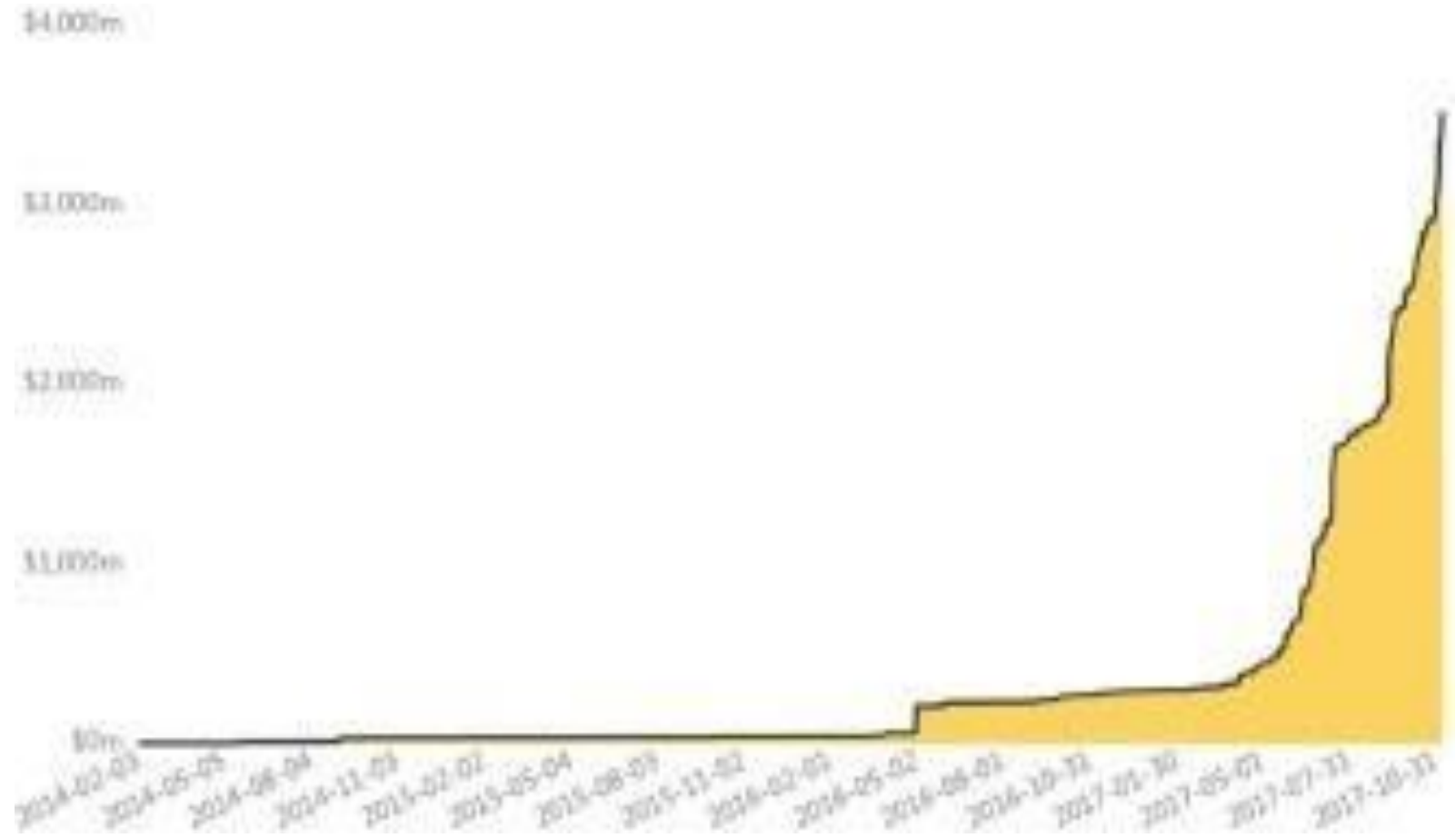
Aula Magna, KOL-G-201, University of Zurich

Raemistrasse 71, 8006 Zurich

Registration: <https://ema.uzh.ch/R796V> or <https://www.susfin.ch/registration-form-online>

Organizing Committee: Prof Dr Kern Alexander (Zurich), Prof Dr Aline Darbellay (Geneva) and Dr David Roth (Zurich)

All-time cumulative funding raised in ICOs



Source: CoinDesk ICO Tracker, November 2018

ICOs: Four Different Regulatory Approaches



Temporary
ban on ICOs



Requirement
of
compliance
with
securities
regulation



Requirement of
compliance with
securities
regulation
→ But clarifying
position as to how
to fall outside the
scope of securities
regulation



Current lack
of clear
regulatory
treatment

prudent

liberal

The Scope of Securities Regulation

US

- Application of securities regulation if tokens are investment contracts: “Howey Test” (SEC v Howey)
 - Investment of money → assets
 - Expectation of profits
 - Common enterprise
 - Profit depending on the efforts of a promoter or third party

Singapore

- Application of securities regulation if tokens are capital markets products
 - Securities
 - Futures contracts
 - Contracts or arrangements for purposes of leveraged foreign exchange trading

Switzerland

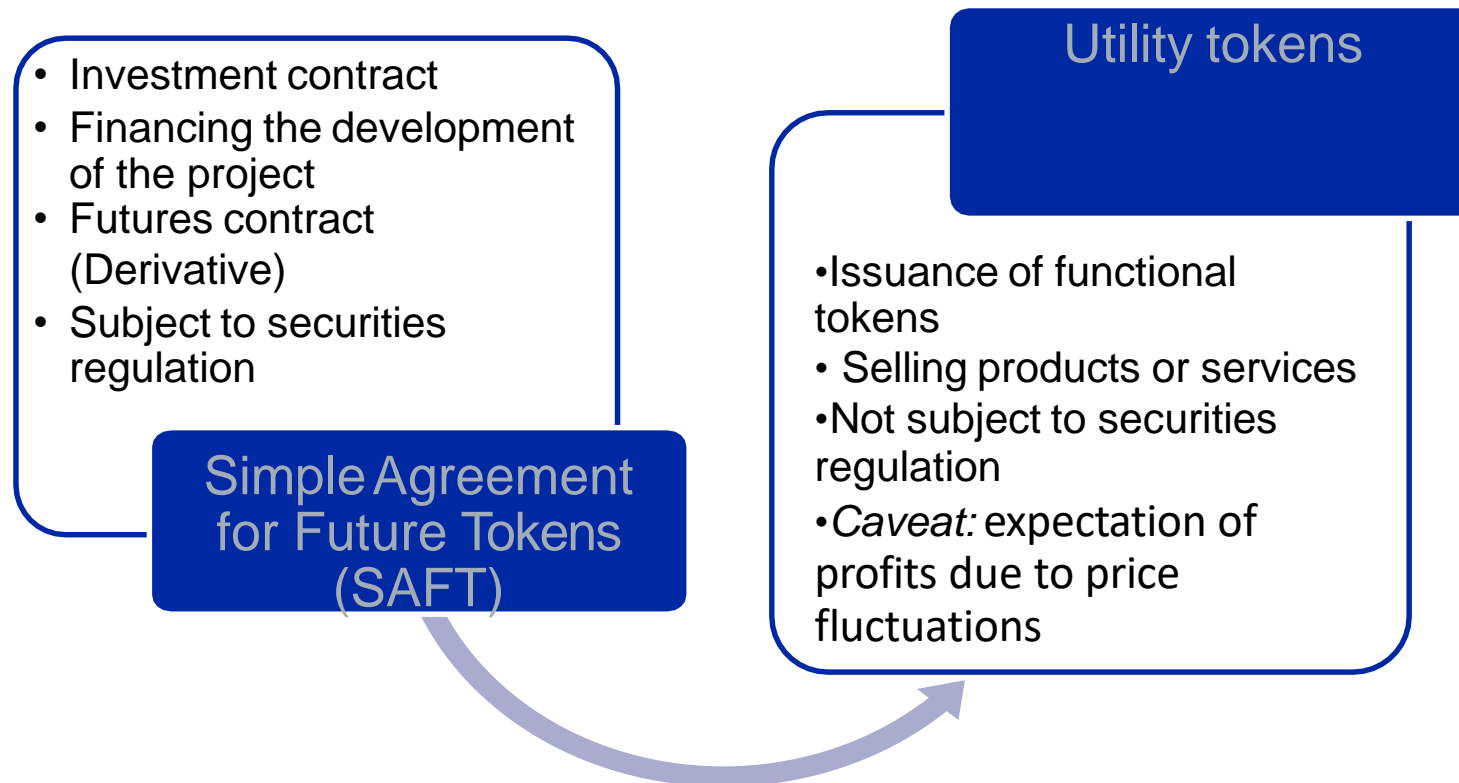
- Application of securities regulation if tokens fall within one of these 4 categories:
 - Certificated securities
 - Uncertificated securities
 - Derivatives
 - Intermediated securities (art. 2 let. b FMIA)

+ FinTech Regulatory Sandboxes

Security vs Utility Tokens

Security tokens: Issuers raise capital through an ICO in order to finance the development of a project

Emerging business model with a view to avoiding the qualification as security tokens:



EU Company Law – Free Movement

Main Areas

- EU Law and Free Movement
- EU right of establishment
- EU leading cases
- Host country regulatory implications

Harmonization

- .Extensive program of company law harmonization
- .Regulatory interaction based on mutual learning between Member States.
- .Reflexive harmonization *versus* regulatory competition
- .Harmonization *versus* unification

The Four Freedoms

- .Optimal allocation of resources within the EU
- .“The internal market shall comprise an area without internal frontiers in which the free movement of **goods**, **persons**, **services** and **capital** is ensured in accordance with the provisions of the Treaty” Art 26 (2)TFEU
- .No barriers and discriminations
- .Harmonization of rules

EU Treaty (TFEU)(Lisbon Treaty)

CHAPTER 2 - RIGHT OF ESTABLISHMENT

Article 49 TFEU (former Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

The Right of Company Establishment

- .The combination of Art 49 and 54 (former art. 43 and 48) allows persons and companies to establish firms (primary establishment),
- .as well as branches, agencies and subsidiaries (secondary establishment),
- .in the Member States of the EU

Free movement of capital
+
right of company establishment
=
the foundation of company law

Reasons to Seek Cross-Border Establishment

- Forum shopping (company law requirements, labour law, insolvency law, and tax, for instance)
- Taking advantage of more advanced judiciary systems
- Expanded access to other EU/EEA markets
- Pros and cons

Continued

2 main legal implications for host state regulating local activities of foreign company:

- a) non discriminatory treatment by host country (host company treated same way as home companies)
- b) prohibition on the host Member State to hinder the establishment in-coming firm based in another MS

Question: Should host country regulatory measures that are non-discriminatory in application to foreign EU-based companies be permitted if they have the effect of obstructing or hindering cross-border establishment? Also, what about prohibition on the home Member States to take measures that hinder the establishment in another MS?

Cnt'd

Art. 54 (former art. 48) «company» is a firm formed in accordance to the law of its member state constituted under civil or commercial law including cooperatives and other legal persons governed by private or public law

•Having their registered office, central administration or principal place of business within the EU

EU Shareholder Rights (1)

- Shareholder Rights Directive (2007/36/EC) adopted in 2007 aimed to improve corporate governance in EU listed companies.
- Directive defines minimum rights for shareholders in EU listed companies.
- Equal treatment for all shareholders in the same position regarding the exercise of voting rights in general meetings are ensured (art. 4).
 - *one share one vote principle*
- Ongoing discussion over 'One share one vote principle'
 - Accepted as best practice by many investors.
 - Several jurisdictions within the EU still allow multiple voting rights (e.g. France, Italy, Netherlands).
 - Dual class shares used by tech companies in US (e.g. Facebook, Alphabet)

EU Shareholder Rights (2)

- Directive (EU) 2017/828 (Shareholder Rights Directive II) was passed to strengthen:
 - shareholder engagement and;
 - transparency
- Key changes are:
 - Identification of shareholders: request information from intermediaries (exemption possible for holdings of less than 0.5%)
 - Transparency of institutional investors and asset managers regarding policy on shareholder engagement
 - Proxy advisers must disclose any code of conduct
 - Directors' remuneration policy must be published for a vote by shareholders
 - Material related party transactions must be publicly announced.

Shareholder rights regarding the Company's Financial Structure

- Capital formation, maintenance and alteration
 - (Second Company Law) Directive 77/91/EEC (1976)
 - Recast of the Second Company Law Directive: Directive 2012/30/EU
 - Directive 2017/1132 (14 June 2017)
- Shareholder approval for change of capital structure
 - Any increase of capital must be decided upon by the general meeting
- Pre-emptive rights – concerns about equity dilution
 - New shares must first be offered to shareholders in proportion to the capital represented by their shares
 - CJEU recognised that shareholders have inherent right to maintain proportionate equity holdings in issued capital of public company, Siemens AG v Henry Nold [1996] C-42/95, I-6017, opinion of Sept 1996, para 15.



Shareholder rights regarding the Company's Financial Structure

Directive (EU) 2017/1132, Art 68 et seq. – safeguards regarding maintenance and alteration of capital

- Right to approve any proposal by management or other party to increase, reduce or alter the capital of the company. Art 68 et seq.
- Pre-emptive rights, art 72 (1). Procedures for an offer of subscription on a pre-emptive basis which must be offered to shareholders of a public limited company whenever the capital is increased by consideration in cash. Art 72 (3)
- Shareholder rights to approve directors' decision to increase or alter company's capital, *significance to address dilution of economic and voting control*

Delaware law – presumption of no *pre-emption rights* unless provided explicitly in company articles of incorporation. DGCL, section 102 (b)(3).

But New York law allows a presumption of pre-emption rights unless the articles explicitly opt-out

- But EU 2017/1132, Arts 68 (2), 72(5) & 83, allow shareholders to opt out of pre-emption rights for maximum period of 5 years by passing resolution at a general meeting.
- Resolution can be renewed without limit based on 1 of 2 types of majority vote:
 - 1) 2/3 shares represented at the meeting; or
 - 2) if a majority present, simple majority of shareholder votes present

Shareholder Rights and Capital Raising

Pre-emptive rights

Concerns about equity dilution = new shares must be offered to shareholders in proportion to the capital represented by their shares

US	EU
Old common rule recognizing pre-emptive rights of shareholders has been largely removed by statutes	Art. 72 Second Company Law Directive 2017/1132/EU (recast: Art. 33 Directive 2012/30/EU)

Voting rights

US	Hong Kong
Listing of companies with weighted voting rights (WVR) is permitted (e.g. dual-class share structures)	Listing rules require the application of the «one share, one vote» principle, however new listing rules (2018) enable innovative companies to depart from this principle to some extent, i.e. to adopt a weighted voting rights (WVR) structure under certain circumstances