Exemptions and the "incidental" argument

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The Act exempts certain persons entirely, beginning with banks, merchant banks, finance companies and certain licensed insurers, which are exempt payment service providers under s. 13. That is why DBS could launch its digital exchange without a separate payment licence while remaining subject to MAS supervision as a bank.[1] Licensed capital markets intermediaries are not exempt as such, although an activity regulated under the SFA is nonetheless not also a payment service where the token is a capital markets product, because a DPT is by definition a medium of exchange and the SFA perimeter takes priority. This is the point at which the two statutes are reconciled in practice. A tokenised share is a security under the SFA and cannot be a DPT at the same time.

The "incidental" argument is frequently raised by firms whose main business is something else. Examples are a law firm receiving fees in tokens, a game developer with an in-game currency, or a software house that converts a corporate client's treasury. The argument has limited force because, unlike the SFA, the Payment Services Act contains no general exemption for activities that are incidental to a non-regulated business. The question is whether the person "carries on a business of providing" the service, which MAS reads as a question of regularity, remuneration

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and holding out.[2] A professional firm that accepts tokens as payment for its own services and converts them for its own account is not providing a service to anyone. A software house that converts a client's treasury into dollars for a spread is dealing. The game developer is helped by the limited-purpose exclusion if the token cannot be cashed out. It loses that help the moment a secondary market develops that the developer supports.

Practice note

Before relying on any exemption from the Payment Services Act, a founder should write down three facts and have them checked. Who is the counterparty to each token movement? Does the firm ever hold tokens or key material for another person? Does the firm earn anything from the movement? If the firm holds nothing and earns nothing from others' tokens, it is probably outside the Act. If either of the last two answers is yes, the firm should assume it needs a licence or a licensed partner and should plan the time accordingly. MAS has consistently refused to treat "we only hold for a few seconds" or "we are a technology company" as exclusions. A wrong answer is an offence under s. 5(3) of the Act.

Notes

1. PSA, s. 13 (exempt payment service providers) and the Payment Services (Exemption for Specified Period) Regulations 2019 for the initial grace period. ↩
2. PSA, s. 5(1), "carries on a business of providing any type of payment service"; MAS FAQs on the Payment Services Act, on the meaning of carrying on a business. ↩

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