Is my token a security?

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The question is the pivot of both regulatory systems, because a security attracts prospectus duties, dealer licensing and market-abuse rules that a payment or utility token does not. The two jurisdictions reach similar outcomes for the clear cases and diverge for the hybrids. FINMA classifies by the economic function of the token: payment tokens serve as means of payment, utility tokens give digital access to an application or service, asset tokens represent assets such as a debt or equity claim or an entitlement to dividends or interest. Asset tokens are securities. Utility tokens are securities if they also have an investment purpose at the time of issue, which includes any utility token sold before the platform exists. Payment tokens are not securities.[1] MAS classifies by whether the token falls within the SFA's list of capital markets products, applying the substance of the rights conferred. A token that confers a debt or equity interest or a right to a pool's returns is a security regardless of label.[2]

Under Swiss law the statutory definition of a security requires standardisation and suitability for mass trading. Uncertificated securities, derivatives and intermediated securities count. Since the DLT Act, ledger-based securities under Art. 973d ff. CO sit squarely within the definition.[3] A token is therefore a security if it embodies a right that has been standardised in a form suitable for trading and if the issuer intended it to be offered publicly in that form. Pure governance tokens with no claim against anyone sit outside the definition for want of a right against an issuer, although FINMA has reserved its view on governance tokens that in substance distribute protocol revenue.[4]

The sequence

1. Does the token give the holder a claim against an issuer or a membership right in an entity? Debt, equity, profit share, interest, dividend or revenue participation: yes. Right to use a service: not by itself. Nothing at all (pure payment or pure governance of a protocol without legal entity): no claim.
2. If there is a claim or membership right, is the token standardised and suitable for mass trading? Tokens issued under a common smart contract to many holders almost always are.
3. If both steps are satisfied, the token is a security in Switzerland and very likely a capital markets product in Singapore. Prospectus, dealer and market rules apply in both hubs.
4. If the token confers only access to a service, ask whether the service exists and is usable at the time of sale. If it does not, Switzerland treats the token as an investment and therefore as a security during the pre-functional phase. Singapore asks whether a reasonable purchaser buys it for use or for appreciation and looks at the marketing.

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5. If the token is a stablecoin or otherwise redeemable, the security question is usually displaced by the deposit or collective investment question in both jurisdictions (see the first two guides).
6. If the token is an NFT, ask whether it is unique in substance or a fractional interest in a pool. A unique NFT representing a work is outside both regimes. Fractionalised NFTs or series marketed on a return are collective investment or securities issues.[5]
7. Record the analysis in a dated classification memorandum, because the classification can change over time. A utility token that was a security at pre-sale ceases to be one when the platform goes live, and the reverse is possible when a protocol starts distributing revenue.

Token feature	Switzerland (FINMA)	Singapore (MAS)
Pure means of payment, no issuer claim	Payment token, outside securities law; AMLA applies to intermediaries	DPT under PSA; not a capital markets product
Access to a live service, no investment marketing	Utility token, outside securities law	Generally outside SFA; may still be a DPT if used as medium of exchange
Access to a future service sold at pre-sale	Security (investment purpose)	Likely capital markets product depending on marketing
Debt or equity claim, profit share	Asset token = security; prospectus under FinSA	Security or debenture; prospectus under SFA Part 13
Share of a managed pool	Collective investment (CISA)	Unit in a collective investment scheme (SFA)
Governance of a protocol, no revenue right	Not a security on current practice; watch revenue distribution	Fact-specific; MAS looks at substance
Stablecoin redeemable at par	Deposit or collective investment analysis	E-money if SGD/fiat-denominated; stablecoin framework pending
Unique NFT	Outside securities law; AMLA only for platforms	Outside SFA; PSA only if used as medium of exchange

Example

A Zug AG develops a decentralised storage network and sells 20 per cent of the token supply to 1,200 purchasers at a time when the network runs only on a testnet. The token will eventually be the sole means of paying for storage. On FINMA's taxonomy the token is a utility token with an investment purpose at the time of sale and therefore a security. The AG needs either a FinSA prospectus or an exemption. Because the offer is to more than 500 persons and the total exceeds CHF 8 million, neither of the quantitative exemptions in Art. 36 FinSA helps, which leaves restricting the sale to professional clients or publishing a reviewed prospectus. Once the mainnet is live and tokens are used for storage, secondary trading is trading in a utility token and not in a security. A memorandum recording the date of that transition protects the exchanges that list it.

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Notes

1. FINMA ICO Guidelines of 16 February 2018, section 3.1 and 3.2; see Part B, Chapter III and Part E, Chapter I.
2. MAS, A Guide to Digital Token Offerings, paras 2.1–2.6 and the case studies in the Annex; see Part K, Chapter IV.
3. FinMIA Art. 2 lit. b; Code of Obligations (CO; OR, SR 220), Art. 973d–973i; see Part D, Chapter III.
4. FINMA's treatment of governance tokens is discussed in Part E, Chapter IX; the Federal Council's position on DeFi is at Part C, Chapter VI.
5. The NFT analysis is at Part E, Chapter X for Switzerland and Part K, Chapter IX for Singapore.

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