The FINMA taxonomy

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FINMA published its ICO Guidelines on 16 February 2018 and has not withdrawn them. They remain the reference point for every Swiss classification exercise and have influenced regulators far beyond Switzerland.[1] The guidelines distinguish three categories by economic function.

Payment tokens are "synonymous with cryptocurrencies" and are intended to be used, now or in the future, as a means of payment for goods or services or as a means of money or value transfer. They give rise to no claims against an issuer. Bitcoin and Ether are the paradigm. FINMA treats their issuance as outside securities law and inside anti-money-laundering law, so that an issuer who sells payment tokens is a financial intermediary under the AMLA if it does so professionally.

Utility tokens are intended to provide digital access to an application or service by means of a blockchain-based infrastructure. FINMA will treat a utility token as a security only if it has an investment purpose at the point of issue. The decisive question is whether the application exists and is usable when the token is sold. A token sold to fund development of a platform that does not yet exist has, in FINMA's words, an investment function and is treated as an asset token until the platform is live.

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Asset tokens represent assets such as a debt or equity claim on the issuer, a share in future company earnings or future capital flows, or a right in a physical asset. FINMA treats asset tokens as securities within the meaning of the Financial Market Infrastructure Act (FinMIA; FinfraG) when they are standardised and suitable for mass trading, which almost all are. The consequences are prospectus duties under the Financial Services Act (FinSA; FIDLEG), potential securities-firm licensing for intermediaries and, since 2021, the availability of the ledger-based security form under Art. 973d ff. CO.

Hybrid tokens combine functions. FINMA applies the requirements of each category cumulatively. A token that is both a means of payment and an access right is subject to the AMLA because of the payment function and may be a security because of any investment component. The guidelines state that the categories are "not mutually exclusive", which in practice means that the most demanding applicable regime governs.[2]

FINMA added a fourth analytical step in its supplement of 11 September 2019, which addressed stable coins. The supplement does not create a new category. It applies the three existing categories to tokens linked to an underlying asset and concludes that the classification depends on the asset and on the redemption right. A token redeemable in fiat currency against the issuer is a deposit under banking law. A token representing a basket of assets managed for the holder is a collective investment. A token representing a commodity is treated according to whether the holder has a property right or a contractual claim.[3]

Notes

1. FINMA, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), 16 February 2018 (FINMA media release of the same date). The guidelines are discussed as a source of law in Part E, Chapter I. ↩
2. FINMA ICO Guidelines of 16 February 2018, section 3.1, final paragraph (hybrid tokens; cumulative application of requirements). ↩

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3. FINMA, Supplement to the guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), 11 September 2019 (FINMA media release of the same date on stable coins). Chapter IV of this Part and Part E, Chapter VII. ↩

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