

Pre-financing, pre-sales and the ruling procedure

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

The guidelines also addressed two practices of the token market. In a pre-financing, investors paid in advance for tokens that would be created only later, and in a pre-sale they acquired, before the main offering, claims to tokens that would be delivered at a later stage. FINMA stated that where these phases conferred claims to acquire tokens in the future, the claims would be treated as securities, in the same way as asset tokens, if they were standardized and suitable for mass trading.¹ An appendix to the guidelines set out the minimum information that FINMA expected in an enquiry: general information on the project, the persons involved and any licences, a description of the project with its goals, technologies and the amounts to be raised, the creation and functions of the tokens and the rights acquired by the buyers, their transfer and any secondary market, the involvement of a financial intermediary subject to the Anti- Money Laundering Act and the planned timing of the various phases of the offering.

In the first months after publication the ruling procedure became the ordinary path for serious projects. A Lugano promoter who wished to issue a token would typically instruct a lawyer to prepare a memorandum on its classification and submit it to FINMA's FinTech desk. The resulting "no-action letter" stated whether FINMA considered the token a security and whether the issuer had to join a self-regulatory organization. FINMA's assessment did not bind the civil courts or the tax authorities. It gave the issuer and its bank sufficient comfort to open accounts and receive fiat currency from the conversion of the proceeds, which in practice was the decisive question. Swiss banks in 2018 were reluctant to accept the proceeds of token sales without a FINMA assessment and without a clear origin of the bitcoin and ether received.²

Essentials. FINMA's guidelines of 16 February 2018 classify tokens by economic function into payment, utility and asset tokens and recognize hybrid forms. Payment token ICOs fall under the Anti-Money Laundering

Act. Asset tokens, and utility tokens with an investment function, are securities when they are standardized and suitable for mass trading. The classification is a matter of substance, decided case by case, and FINMA's guidance binds neither the courts nor the tax authorities.

1 Securities law after FinSA

The consequences of a classification as securities changed with the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), which entered into force on 1 January 2020. Under Article 3 letter b FinSA, securities are standardized certificated and uncertificated securities, in particular uncertificated securities under Article 973c CO and ledger-based securities under Article 973d CO, as well as derivatives and intermediated securities, which are suitable for mass trading. A public offer of such securities requires a prospectus under Articles 35 ff. FinSA unless an exemption applies, for example because the offer is addressed only to professional clients, to fewer than 500 investors or with a minimum denomination of CHF 100,000.³ Asset tokens that qualify as securities therefore trigger the prospectus duty. Their admission to trading requires a licensed trading venue or, since 2021, a DLT trading facility. The dealing in such tokens on a commercial basis for clients may require a securities firm licence under Article 41 FinIA.

The same Act gave the token market a further distinction. Under Article 3 letter a FinSA, financial instruments are equity securities and debt instruments, both defined by reference to securities, and also units in collective investment schemes, structured products, derivatives, deposits whose redemption value or interest is risk- or pricedependent, and bonds in the sense of units in an overall loan subject to uniform conditions. A token that conferred a share in a loan, a structured return or a riskdependent claim for repayment could therefore be a financial instrument under one of these headings even where its classification as a security was doubtful, with the result that the rules of conduct of FinSA would apply to its offer to clients. For the Lugano adviser this means that the analysis of a token must be carried out twice, once for the question of whether it is a security and once for the question of whether it is a financial instrument. The answers determine prospectus duties, rules of conduct, the licence of the dealer and, in the European context discussed below, the boundary between MiCAR and the Markets in Financial Instruments Directive.

2 Notes

1. FINMA, ICO guidelines (above), section 3.2.3 ("In the case of the pre-financing and pre-sale phases of an ICO which confer claims to acquire tokens in the future, these claims will also be treated as securities (i.e. in the same way as asset tokens) if they are standardised and suitable for mass standardised trading") and appendix "Minimum information requirements for ICO enquiries" (general information; project description; token issue; transfer and secondary market; commissioning of "a financial intermediary who is subject to AMLA in Switzerland"; "timing of the various ICO phases, milestones"). ↩
2. Swiss Bankers Association, guidelines on opening corporate accounts for blockchain companies (first edition 2018), which set out the banks' expectations regarding the origin of the funds from token sales. ↩
3. Federal Act on Financial Services of 15 June 2018 (Financial Services Act, FinSA), SR 950.1, Art. 3 lit. a and b, <https://www.droit-bilingue.ch/de-en/9/95/950.1-3-6.html>, Art. 35 para. 1, <https://www.droit-bilingue.ch/de-en/9/95/950.1-35-38.html>, and Art. 36 para. 1 lit. a, b and d ("addressed solely at investors classified as professional clients"; "fewer than 500 investors"; "minimum denomination per unit of CHF 100,000"), <https://www.droit-bilingue.ch/de-en/9/95/950.1-36-39.html>; Federal Act on Financial Institutions of 15 June 2018 (FinIA), SR 954.1, Art. 41 (securities firm trading in securities "in its own name for the account of clients" on a commercial basis), <https://www.droit-bilingue.ch/de-en/9/95/954.1-41-44.html>. ↩

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