

| Legal Implications on Token Issuing (ICO) Version 1.0, March 2018, Cornelia Stengel | | Payment Token | Utility Token | Asset Token |
|---|---|---|--|--|
| <p>Note: Categorization primarily for illustration purposes. Does not anticipate any legal or regulatory qualification. Any Token always needs to be assessed and will be regulated as to its substance irrespective of its form or label (substance over form).</p> | <p>FINMA https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/</p> | Token is intended to function as a means of payment. Payment tokens are digital units of value. They do not confer any particular right on the holder. | Token confers digital access rights to an application or service. Utility token has no function as an investment in economic terms. | Token represent assets (e.g. claims to dividends, interest payments or shares in a company, income, etc.) or may also include membership rights. Asset tokens are similar to equities, bonds or other derivative financial instruments. |
| | <p>bundesblock.de http://bundesblock.de/wp-content/uploads/2018/02/180209_Statement-Token-Regulation_blockchain-bundesverband.pdf</p> | Token is intended to function as a means of payment <i>external to the platform or not only exclusively between the platform and its users but also between users.</i> | Tokens are supposed to convey some functional utility to token holders other than/in addition to payment for goods or services, in the form of access to a product or service. <i>Also can include:</i> <i>(i) right of access to a (future) service (once developed)</i> <i>(ii) right to redeem the token for another token or service</i> <i>(iii) voting rights which often are designed to shape the functionality of the product.</i> | Tokens is comparable to conventional financial instruments, especially to conventional debt and equity instruments. |
| Phase | Area of Law | | | |
| <p>Pre-Financing</p> <p>No token exists at the time the funds are raised. Investors are promised that the blockchain or tokens will be developed and they will receive these tokens in due course, or that the project developers will implement a corresponding allocation proposal in the Genesis code of the blockchain protocol to be published. A repayment obligation and any other claim against the issuers is excluded.</p> | AML | No issuing of a means of payment, because no tokens exist yet. Therefore no financial intermediary activities of the issuers: AMLA not applicable on token issuing. | No financial intermediary activities of the issuers: AMLA not applicable on token issuing. | No financial intermediary activities of the issuers: AMLA not applicable on token issuing. |
| | Banking | No banking license required because there are no claims against the issuers. However, if there is a claim against the issuers, this would qualify as acceptance of deposits: requires a banking license (check exceptions). | No banking license required because there are no claims against the issuers. However, if there is a claim against the issuers, this would qualify as acceptance of deposits: requires a banking license (check exceptions). | No banking license required because there are no claims against the issuers. However, if there is a claim against the issuers, this would qualify as acceptance of deposits: requires a banking license (check exceptions). |
| | Financial Market Infrastructure | Not treated as securities, provided that (as usual) there are no tradable claims against the issuers. | Not treated as securities, provided that (as usual) there are no tradable claims against the issuers. | Not treated as securities, provided that (as usual) there are no tradable claims against the issuers. |
| <p>Voucher</p> <p>Investors receive a Token A, combined with the option to exchange it for a Token B or to purchase Token B at a later date. Token B does not yet exist, but is being developed. A repayment obligation is excluded.</p> | AML | No issuing of a means of payment. Therefore no financial intermediary activities of the issuers: AMLA not applicable on token issuing. | No financial intermediary activities of the issuers: AMLA not applicable on token issuing. | No financial intermediary activities of the issuers: AMLA not applicable on token issuing. |
| | Banking | No acceptance of public deposits (no banking license required) if invested money is transferred as consideration (arising from a contract for transfer of ownership or from a service contract) or if token is treated as security (bond). | No acceptance of public deposits (no banking license required) if invested money is transferred as consideration (arising from a contract for transfer of ownership or from a service contract) or if token is treated as security (bond). | No acceptance of public deposits (no banking license required) if invested money is transferred as consideration (arising from a contract for transfer of ownership or from a service contract) or if token is treated as security (bond). |
| | Financial Market Infrastructure | Treated as securities, provided that (as usual) there is a tradable claim against the issuers (transfer of Token B). | Treated as securities, provided that (as usual) there is a tradable claim against the issuers (transfer of Token B). | Treated as securities, provided that (as usual) there is a tradable claim against the issuers (transfer of Token B). |
| <p>Pre-Functional</p> <p>Token B is issued directly, but it does not yet work as planned in the future (e.g. as a means of payment), because the planned system in which the token can be used is still to be developed. A repayment obligation is excluded.</p> | AML | If issuer carries out a financial intermediary activity (accepts assets and transfers them to third parties who have accepted the token as a means of payment for the purpose of settling the payment): AML obligations to comply. If issuer does not carry out a financial intermediary activity : AMLA not applicable on token issuing. | If no payment function is connected: issuing of a pure utility token (FINMA definition) does not involve any financial intermediary activity: AMLA not applicable on token issuing. If token also includes a payment function , it must be assessed whether this is merely an accessory "secondary function" that is added to a (main) usage function outside the financial area, or whether the payment function is also to be regarded as a main function. The issue of utility tokens with an ancillary purpose for payment is not subject to the AMLA, provided that the main function of the token fulfils a purpose outside the financial sphere and the other requirements of FINMA Circular 11/1 are met. | The issuing of tokens qualifying as securities is not subject to the AMLA. (However, trading in securities is subject to subordination.) |
| | Banking | No acceptance of public deposits (no banking license required) if there are no claims against the issuers. However, if there is a claim against the issuers, this would qualify as acceptance of deposits: requires a banking license (check exceptions). | No acceptance of public deposits (no banking license required) if invested money is transferred as consideration (arising from a contract for transfer of ownership or from a service contract) or if token is treated as security (bond). | No acceptance of public deposits (no banking license required) if token is treated as security (bond). |
| | Financial Market Infrastructure | Treated as securities if promoter commits to investors to build a working application and a secondary market for pre-functional tokens exists before application is finalized, or promises for such a secondary market are made. | Pure utility token (FINMA definition) is not treated as security. Except promoter commits to investors to build a working application and a secondary market for pre-functional tokens exists before application is finalized, or promises for such a secondary market are made. If token (also) represents asset (tradable claim against the issuers): will be treated as security. | Treated as securities, provided that (as usual) there is a tradable claim against the issuers. |
| <p>Functional</p> <p>The fully functional token is issued.</p> | AML | If issuer carries out a financial intermediary activity (accepts assets and transfers them to third parties who have accepted the token as a means of payment for the purpose of settling the payment): AML obligations to comply. If issuer does not carry out a financial intermediary activity : AMLA not applicable on token issuing. | Generally no payment function connected. As a result, the issue of a pure utility token (FINMA definition) does not involve any financial intermediary activity: AMLA not applicable on token issuing. If token also includes a payment function , it must be assessed whether this is merely an accessory "secondary function" that is added to a (main) usage function outside the financial area, or whether the payment function is also to be regarded as a main function. The issue of usage tokens with an ancillary purpose for payment is not subject to the AMLA, provided that the main function of the token fulfils a purpose outside the financial sphere and the other requirements of FINMA Circular 11/1 are met. | The issuing of tokens qualifying as securities is not subject to the AMLA. (However, trading in securities is subject to subordination.) |
| | Banking | No acceptance of public deposits (no banking license required) if there are no claims against the issuers. However, if there is a claim against the issuers, this would qualify as acceptance of deposits: requires a banking license (check exceptions). | No acceptance of public deposits (no banking license required) if invested money is transferred as consideration (arising from a contract for transfer of ownership or from a service contract) or if token is treated as security (bond). | No acceptance of public deposits (no banking license required) if token is treated as security (bond). |
| | Financial Market Infrastructure | Not treated as securities. | Pure utility token (FINMA definition) is not treated as security. If token (also) represents asset (tradable claim against the issuers): will be treated as security. | Treated as securities, provided that (as usual) there is a tradable claim against the issuers. |