CENTRE DE DROIT
BANCAIRE ET FINANCIER

Stablecoins

# FINMA clarifies its practice

Par Vaïk Müller le 31 July 2024

On 26 July 2024, FINMA published Supervisory Notice 06/2024 on stablecoins. The communication covers the legal categorisation of stablecoins, the application of the anti-money laundering provisions, FINMA's practice with regard to default risk guarantees and the associated risks. This communication, which does not really contain anything new, is nevertheless a useful compendium of the Authority's practice developed since the publication of the Supplement to the Practical Guide for reporting issues relating to initial coin offerings (ICOs) on 11 September 2019.

**Classification of stablecoins**

FINMA points out that the relationship between the holders of the tokens and the issuer may be classified either as a deposit within the meaning of banking law (Art. 5 para. 1 OB) or as a collective investment scheme within the meaning of the CISA (Art. 7 CISA). The distinction between these two classifications depends essentially on the party bearing the risk on the assets to which the stablecoin is attached. If these assets are managed at the expense and risk of the stablecoin holder, the issuer tends to be a collective investment, whereas if the expenses and risks are borne by the issuer, the custodian status is more appropriate.

**Combating money laundering and the financing of terrorism**

The AMLA rules generally apply to stablecoins, particularly when they are classified as deposits. FINMA, in agreement with the FATF, stresses the increased risks in this area, including the risk of circumventing sanctions, and the need to apply the mechanisms for identifying the holders of tokens and their beneficial owners either directly by the issuer in its capacity as a financial intermediary affiliated to an SRO, or through another financial intermediary in accordance with the MLA. FINMA thus reiterates the ban on anonymous transfers. Stablecoins based on Zero-knowledge protocols that allow anonymity should therefore be prohibited.

**Bank guarantee requirements and risks**

The advantage of using a default risk guarantee issued by a bank (guarantee) is to enable the issuer of a stablecoin to benefit from the exception provided for in Art. 5 para. 3 let. f OB and thus avoid the classification of the assets attached to the stablecoin as a bank deposit.
FINMA has defined five minimum conditions for the OB exception in order to protect depositors and applies these conditions to collateral issued in connection with stablecoins on the basis of the principle of technological neutrality :

1. In the event of the issuer's bankruptcy, each customer must have a claim of his own against the bank which he must be able to assert at the latest at the time of the issuer's bankruptcy ; in addition, customers must be informed of the guarantee.
2. The guarantee must cover at least the sum of all public deposits, including interest.

3. The sum of deposits counted towards the coverage requirement must never exceed the upper limit of the guarantee.
4. The formal and material provisions of the guarantee must not be designed in such a way as to hinder a depositor's ability to claim repayment quickly and without complication.
5. The bank's claims and exceptions are permitted within the limits provided by law.

FINMA rightly points out that while these requirements increase depositor protection, they cannot be compared with the level of protection attached to a banking authorisation. In particular, depositors benefit neither from deposit protection within the meaning of art. 37a BL nor from the scope of full prudential supervision, and an issuer's membership of an SRO within the meaning of the MLA cannot be equated with such supervision.
Lastly, FINMA points out that banks that provide this type of guarantee are exposed to reputational risks, particularly in the event of an issuer's bankruptcy, not to mention the regulatory and legal risks that a failure to identify stablecoin holders could indirectly expose banks to. This clarification by FINMA, which seems to leave the door open, can be read as a call for caution to banks and a firm encouragement to select projects carefully after due diligence.

**Conclusion**

In the future, the structuring of stablecoins using the exception for guaranteeing default risk provided for by the OB may not last long, or at the very least be subject to stricter conditions inspired by the practice of FINMA. In its report of 16 December 2022, which was expressly cited by FINMA in its communication, the Federal Council called for an assessment of the exceptions in the Banking Ordinance to determine whether they take sufficient account of the concept of protection that is at the heart of the Banking Act. A tightening of the conditions for issuing stablecoins in Switzerland would be in line with MiCA in the EU (which, incidentally, distinguishes between tokens referring to one or more assets and electronic money tokens). It should be pointed out here that Switzerland still has more flexible regulations on cryptoassets than EU member states, although this flexibility is not synonymous with permissiveness, as FINMA's practice shows.

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