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Autorité fédérale de surveillance des marchés financiers FINMA
Autorità federale di vigilanza sui mercati finanziari FINMA
Swiss Financial Market Supervisory Authority FINMA

FINMA Guidance 06/2024

Stablecoins: risks and challenges for issuers of stablecoins and banks providing guarantees

26 July 2024

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Contents

1 Introduction 3

2 Information concerning the legal classification of stablecoins 3

3 Information concerning anti-money laundering regulations 4

4 Information concerning treatment under banking law 5

4.1 Requirements for the default guarantee 6

4.2 Reputational risks for banks providing guarantees in the case of default guarantees 6

4.3 Federal Council report: recognised need for action 7

1 Introduction

In its supplement to the guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs) published on 11 September 2019 (supplement to the ICO guidelines),[1] FINMA noted with regard to projects seeking to issue stablecoins that questions frequently arise regarding licensing requirements under the Banking Act (BA; SR *952.0*) or the Collective Investment Schemes Act (CISA; SR *951.31*).

Projects seeking to issue stablecoins have gained in importance since 2019. Several projects have been realised in Switzerland. In this guidance, FINMA provides information on aspects of financial market law that arise in relation to projects seeking to issue stablecoins and their impact on the supervised institutions.

2 Information concerning the legal classification of stablecoins

As described in the supplement to the ICO guidelines, projects in connection with stablecoins usually pursue the goal of providing a means of payment with low price volatility on a blockchain.

The issuers of stablecoins seek to achieve this by using a stabilisation mechanism in the form of a link to one or more underlying assets such as national currencies.

As a result, stablecoin holders generally have a payment claim against the issuer at any time.

For this reason, these claims are usually categorised as deposits under banking law or collective investment schemes. To distinguish between a deposit under banking law and a collective investment scheme it is important whether the underlying assets are managed for the account and risk of the stablecoin holder (indicative of a collective investment scheme) or for the account and risk of the issuer (indicative of a deposit under banking law).

Due to their usual intended purpose as a means of payment, the Anti-Money Laundering Act (AMLA; SR *955.0*) is almost always applicable.

[1] https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-stable-coins.pdf

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3 Information concerning anti-money laundering regulations

In 2020, the Financial Action Task Force (FATF) found that stablecoins share many of the same potential money laundering and terrorist financing risks as cryptocurrencies. These include the possibility for anonymous transfer via self-managed wallets, the global reach and, in particular, the suitability for the layering stage in the money laundering process. The attractiveness of stablecoins for criminals is increased by the intended price stability and their function as a store of value. Furthermore, the war in Ukraine and the Hamas attack have shown that stablecoins are also attractive for circumventing sanctions and financing terrorism. On 9 July 2024, the FATF also published a Targeted Update on Implementation of the FATF Standards on Virtual Assets and Virtual Asset Service Providers.[2]

The regular qualification of the issuer's liability to the respective stablecoin holder as a deposit under banking law leads to a permanent business relationship within the meaning of anti-money laundering legislation.

The stablecoin issuer is therefore considered a financial intermediary for the purposes of anti-money laundering legislation and must, among other things, verify the identity of the stablecoin holder as the customer in accordance with the applicable obligations (Art. 3 AMLA) and establish the identity of the beneficial owner (Art. 4 AMLA). If doubt arises in the course of the business relationship as to the identity of the customer or of the beneficial owner, the verification of identity or establishment of identity must be repeated (Art. 5 para. 1 AMLA).

In this context, FINMA draws attention to the increased risks of money laundering, terrorist financing and the circumvention of sanctions. These also result in reputational risks for the Swiss financial centre as a whole.

With regard to the issuance of stablecoins by supervised institutions, FINMA set out its supervisory practice on page 19 f. of its 2021 Annual Report.[3] In particular, the identity of all persons holding the stablecoins must be adequately verified by the issuing institution or by appropriately supervised financial intermediaries. In order to address the risks and fulfil the requirements under anti-money laundering law, contractual and technological transfer restrictions are required for the issuance of stablecoins by supervised institutions.

In 2024, the CGMF (interdepartmental coordinating group on combating money laundering and the financing of terrorism) also identified the

[2] https://www.fatf-gafi.org/en/publications/Fatfrecommendations/targeted-update-virtual-assets-vasps-2024.html

[3] https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/geschaeftsbericht/20220405-finma_jahresbericht_2021.pdf

increased risk of money laundering and terrorist financing through crypto assets in a report.[4]

In its aforementioned report, the CGMF also refers to the aforementioned FINMA statements and assumes that the prohibition of bearer savings books pursuant to Article 5 CDB 20[5] applies to transactions with stablecoins in a technology-neutral way.[6]

This prohibition of anonymous transfers is a consistent application of the general obligations of financial intermediaries under Articles 3, 4 and 5 AMLA, namely to verify the identity of their clients, and therefore applies to all financial intermediaries under Article 2 AMLA.

4 Information concerning treatment under banking law

In the international environment, issuers of stablecoins are expected to be subject to appropriate supervision at national level, including in accordance with the recommendations of the FSB (Financial Stability Board) from 2023.[7]

The acceptance of deposits from the public on a professional basis generally requires a banking licence.

Deposits from the public are considered to be liabilities owed to customers (Art. 5 para. 1 of the Banking Ordinance [BO; SR *952.02*]). However, the exceptions pursuant to Articles 5 paras. 2 and 3 BO remain reserved. Funds where the repayment and interest to be paid are guaranteed by a bank (default guarantee) are not considered to be deposits from the public in accordance with Article 5 para. 3 let. f BO.

FINMA notes that various stablecoin issuers in Switzerland use default guarantees from banks, which means that they do not require a licence from FINMA under banking law on the basis of Article 5 para. 3 let. f BO, but instead only need to be affiliated to a self-regulatory organisation as a financial intermediary.

This creates risks for the stablecoin holders (section 4.1) and the bank providing the default guarantee (section 4.2).

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[4] https://www.newsd.admin.ch/newsd/message/attachments/86329.pdf (page 8).

[5] Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 20); https://www.swissbanking.ch/_Resources/Persistent/6/2/e/e/62eec3df0685e359c5a376dfca79dec8b908ea9c/SBA_Agreement_CDB_2020_EN.pdf

[6] https://www.newsd.admin.ch/newsd/message/attachments/86329.pdf (page 27 f.).

[7] https://www.fsb.org/wp-content/uploads/P170723-3.pdf (page 3 f.).

4.1 Requirements for the default guarantee

In order to protect depositors, FINMA has developed certain minimum requirements for the applicability of the exception for default guarantees. These requirements are to be applied in a technology-neutral way and also apply to default guarantees in the context of stablecoins:

1. In the event of the bankruptcy of the stablecoin issuer, each customer must have their own claim against the Swiss bank issuing the default guarantee. Customers must be informed of the default guarantee;
2. The default guarantee must cover at least the total of all public deposits including any interest earned by customers;
3. In accordance with the scope of cover, it must be ensured that the total deposits covered by the cover requirement never exceed the upper limit of the default guarantee;
4. The formal and material provisions of the default guarantee must not prevent the depositor from making an uncomplicated, rapid call on the default guarantee;
5. Defences and objections by the bank to the extent provided for by law are permissible;

In addition, the parties are generally free to choose the legal basis applicable to the default guarantee. There is no prescribed form. To ensure that the default guarantee can be called quickly by customers, FINMA’s practice is that the claim in question must be due at the time of insolvency, i.e. at the latest when bankruptcy proceedings are opened against the stablecoin issuer, and not only when a certificate of loss is issued.

Although these requirements increase depositor protection, they are not comparable to the level of protection afforded by a banking licence. In particular, stablecoin holders do not benefit from deposit protection under banking law in accordance with Article *37a* BA.

If there are several default guarantees, the increased need for coordination and the resulting operational risks must be pointed out. If these risks are not adequately addressed, unauthorised activity cannot be ruled out due to the absence of the requirements set out in Article 5 para. 3 let. f BO.

4.2 Reputational risks for banks providing guarantees in the case of default guarantees

FINMA points out that, among other things, a breach of obligations under the AMLA by the stablecoin issuer can also indirectly lead to risks for the bank providing the default guarantee.

In the event of irregularities at the stablecoin issuer, the bank providing the default guarantee may suffer reputational damage due to its contractual relationship with the issuer and may also be exposed to legal risks.

In addition, as mentioned above in section 4.1, the stablecoin holders have a direct claim under the default guarantee against the bank providing the default guarantee in the event of the bankruptcy of the stablecoin issuer. In this regard, it should be noted that there is a risk that dishonest stablecoin holders could assert their claims under the default guarantee against the bank providing the default guarantee. In such cases, the legal and reputational risks would be compounded by high regulatory costs, particularly in order to comply with AMLA obligations.

4.3 Federal Council report: recognised need for action

The Federal Council's report on the amendments to the Banking Act of 15 June 2008 pursuant to Article 52*a* of the Banking Act of 16 December 2022[8] concludes on pages 3 and 6 that, among other things, the exception for default guarantees (possibly in combination with other exceptions) is used to structure business models outside the licensing parameters. It goes on to say that the exceptions set out in the BO should be reviewed to ensure that they continue to provide adequate protection (cf. Art. 1 para. 2 BA).

In the upcoming discussions, FINMA will endeavour to ensure that the risks associated with default guarantees are adequately addressed.

[8] https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-92271.html